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Attorneys for Defendant, Counterclaim Plaintiff
 and Third-Party Plaintiff Dexon Computer, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

CISCO SYSTEMS, INC., a Delaware
 corporation and CISCO TECHNOLOGY,
 INC., a California corporation,

Plaintiffs and Counterclaim
 Defendants,

v.

DEXON COMPUTER, INC., a Minnesota
 corporation,

Defendant, Counterclaim
 Plaintiff and Third Party
 Plaintiff.

v.

AND RELATED CROSS-ACTIONS

Case No. 3:20-CV-4926-CRB

**DECLARATION OF MICHAEL M.
 LAFEBER IN SUPPORT OF
 DEFENDANT AND COUNTERCLAIM
 PLAINTIFF DEXON COMPUTER, INC.'S
 MOTION FOR LEAVE TO FILE
 FOURTH AMENDED COUNTERCLAIMS**

Judge: Hon. Charles R. Breyer
 Date: June 17, 2022
 Time: 9:00 a.m.
 Crtrm.: 6

Hon. Charles R. Breyer
 Presiding Judge

Trial Date: None

1 1. My name is Michael M. Lafeber, and I am an attorney at Taft Stettinius & Hollister
 2 LLP, in Minneapolis, Minnesota, and counsel of record for Dexon Computer, Inc., (“Dexon”) in the
 3 above-titled action. I make this declaration in support of Dexon’s Motion for Leave to File Dexon’s
 4 PROPOSED Fourth Amended Counterclaims.

5 2. On or about April 19, 2022, Dexon learned for the first time that Cisco’s purported
 6 EULA governing products sold by Cisco in 2012 included an “exception” expressly allowing the
 7 transfer and use of Cisco’s embedded software by secondary market purchasers. Namely, Dexon’s
 8 California local counsel was contacted by an attorney adverse to Cisco in another matter who
 9 advised she had information relevant to Dexon’s counterclaims. I subsequently spoke directly with
 10 such counsel on or about April 20, 2022. She explained that Cisco’s 2012 EULA contained an
 11 “exception” which allowed secondary market purchasers to freely transfer and use Cisco products,
 12 including the products’ embedded software. She provided the text of the “exception” which
 13 provides:

14
 15 Exceptions

16 1. Software Bundled with Hardware: In situations where Products
 17 combine Hardware and Software and there is no separate Product code or
 18 License Fee charged for the Software on the applicable Cisco then-current
 19 published price list at the time of transfer (and therefore a separate License
 20 Fee for the Software cannot be determined), an exception will be made to
 21 allow for the transfer without the transferee being required to pay a new
 22 License Fee.

23 3. I contacted Cisco’s counsel Lou Feuchtbaum via email on April 21, 2022 to advise
 24 of the newly discovered information and Dexon’s intent to amend its counterclaims, subject to
 25 completing its evaluation and investigation. Due to Cisco’s practice of “overwriting” its purported
 26 online EULA and applicable policies, Dexon had not yet been able to locate the earlier version of
 27 any Cisco purported EULA incorporating the apparent “exception.” In the interest of judicial
 28 economy, I advised that I would provide a draft of any contemplate amendments upon completion
 29 and proposed a stipulation which would include extending the April 28, 2022 due date for Cisco’s
 30 anticipated motion to dismiss Dexon’s Third Amended Counterclaims (“TAC”).

1 4. I followed-up on April 25, 2022 and provided Mr. Feuchtbaum with the promised
2 draft of Dexon's then current PROPOSED Fourth Amended Counterclaims. I also included a draft
3 or proposed Stipulation allowing the amendments and extending the schedule for Cisco's anticipated
4 motion to dismiss Dexon's TAC. Mr. Feuchtbaum responded that same day and confirmed that
5 Cisco's earlier documents did in fact include an apparent "exception." According to Mr.
6 Feuchtbaum, "[T]he new language that Dexon has cited last appeared in a 2014 document." Mr.
7 Feuchtbaum further advised that Cisco was "looking for the documents that would apply for the
8 relevant time period and will share those with you, whatever they might say."

9 5. I responded to Mr. Feuchtbaum on April 26, 2022. In the interest of judicial
10 economy, I proposed stipulating to extend the due date for Cisco's motion to dismiss pending a
11 resolution of Dexon's anticipated amendment. I explained that the newly discovered "exception"
12 was highly relevant regardless of whether it was last used in 2014. Namely, I noted that Dexon has
13 sold and will continue to sell Cisco products from as early as 2009 forward – including model years
14 governed by the apparent "exception." Further, Cisco has published, and continues to publish
15 advertisements and communications advising secondary market consumers that such products are
16 governed by a purported EULA prohibiting the sale and subsequent use of such products on the
17 secondary market. Cisco's published communications fail to distinguish products governed by the
18 apparent "exception." My response reasoned that the proposed stipulation would give the parties
19 an opportunity to further investigate the facts, give Cisco more time to decide whether it is amenable
20 to stipulating, and defer Cisco's motion to dismiss Dexon's TAC until the amendment issue is
21 resolved.

22 6. By way of response dated April 27, 2022, Cisco confirmed and revealed that the
23 "exception" was in effect for a period which included 2012-2017. Specifically, Cisco explained that
24 the "exception" was included in Cisco's "Software Transfer and Relicensing Policy" from at least
25 2012 until some unknown period in 2017. ("No later than 2017, Cisco's Software License Transfer
26 and Re-Use Policy ('Policy') was revised to remove the Fee Exception.") Cisco also provided full
27 versions of its 2014 "Cisco Software Transfer and Re-Licensing Policy" containing the "exception"
28 and its 2017 "Software License Transfer and Re-Use Policy" with the "exception" removed. Despite

EXHIBIT A

Lagergren, Christopher

From: Feuchtbaum, Louis P. <lfeuchtbaum@sideman.com>
Sent: Friday, May 6, 2022 6:12 PM
To: Lafeber, Michael
Cc: Balthazor, O. Joseph Jr.; Lagergren, Christopher; Amanda R. Washton; Chakraborty, Ria; Nelson, Richard
Subject: RE: Cisco v. Dexon / Amendment to Counterclaims

[EXTERNAL MESSAGE]

This Message originated outside your organization.

Hi Mike,

I apologize for my delay in responding. Dexon provided an excerpt that described a Fee Exception that it claimed was in effect during 2012. In response, I was able to locate a 2014 document, entitled "Cisco Software Transfer and Relicensing Policy," which had the quoted language in it. The next version of that document I was able to locate is from 2017, and that document does not contain the Fee Exception. So, the reasonable conclusion is that the Fee Exception had been removed prior to or in 2017.

-Lou

From: Lafeber, Michael <MLafeber@Taftlaw.com>
Sent: Monday, May 2, 2022 11:57 AM
To: Feuchtbaum, Louis P. <lfeuchtbaum@sideman.com>
Cc: Balthazor, O. Joseph Jr. <JBalthazor@Taftlaw.com>; Lagergren, Christopher <CLagergren@Taftlaw.com>; Amanda R. Washton <a.washton@conklelaw.com>; Chakraborty, Ria <RChakraborty@taftlaw.com>
Subject: RE: Cisco v. Dexon / Amendment to Counterclaims

Lou,

While Dexon disagrees with Cisco's analysis and position, I appreciate your response and willingness to disclose clarifying facts. I do have one request for further clarification to assist in Dexon's evaluation. Your email indicates that "No later than 2017, Cisco's Software License Transfer and Re-Use Policy ("Policy") was revised to remove the Fee Exception." When does Cisco claim the amended "Policy" removing the "Fee Exception" went into effect?

Your continued cooperation is appreciated.

From: Feuchtbaum, Louis P. <lfeuchtbaum@sideman.com>
Sent: Wednesday, April 27, 2022 12:58 PM
To: Lafeber, Michael <MLafeber@Taftlaw.com>
Cc: Balthazor, O. Joseph Jr. <JBalthazor@Taftlaw.com>; Lagergren, Christopher <CLagergren@Taftlaw.com>; Amanda R.

Washton <a.washton@conklelaw.com>

Subject: RE: Cisco v. Dexon / Amendment to Counterclaims

[EXTERNAL MESSAGE]

This Message originated outside your organization.

Dear Mike,

Dexon's Proposed Fourth Amended Counterclaims ("PFAC") depend upon an allegation, which it states on information and belief, that a 2012 exception to certain licensing fees ("Fee Exception") was applicable during the period from 2019-2021, the period during which all of the relevant conduct in Dexon's PFAC is alleged to have occurred. Dexon's presumption is wrong. I cannot find any factual grounds that would support applying the Fee Exception to the events alleged in the PFAC.

First, it is worth noting that the 2012 Fee Exception does not affect Cisco's licensing rights to the embedded software. It merely waives certain software licensing fees where those fees cannot be easily determined. But, more to the point, the 2012 Fee Exception is wholly inapplicable to the allegations in Dexon's PFAC for at least two separate and independent reasons:

- First, the 2012 Fee Exception was not in effect during the period relevant to Dexon's counterclaims. The Fee Exception was last published during 2014, in a document incorporated by reference into the EULA. That Exception was not part of the EULA in effect during 2019 to 2021. To the contrary, and as described more fully below, a policy (the same one that originally included the Fee Exception) that was published during 2018 and that was in effect during the relevant period, clearly describes that there is an applicable license fee for all software embedded on products that are resold by Dexon. Simply put, there is no applicable Fee Exception because it was superseded long before the conduct alleged in Dexon's PFAC would have occurred.
- Second, by its plain language, even if the Fee Exception had not been superseded, it would still not apply to the specific products described in Dexon's PFAC. The Fee Exception provides that, "[i]n situations where Products combine Hardware and Software and there is no separate Product code or License Fee charged for the Software on the applicable Cisco then-current published price list at the time of transfer (and therefore a separate License Fee for the Software cannot be determined), an exception will be made to allow for the transfer without the transferee being required to pay a new License Fee." But, the Fee Exception could never apply to the products relevant to the PFAC because the conditions precedent to it being applied were never satisfied. Cisco did publish license fees for the embedded software on all of the products that Dexon sold to the customers described in its PFAC.

I have attached a copy of the 2014 Cisco license transfer policy, which contains the language that Dexon is relying upon. You will find it under “Exceptions”, section 1 (at page 2).

Applicable Policy Requires Payment of Licensing Fees:

Finally, and in addition to the 2012 Fee Exception not being applicable to the allegations in Dexon’s PFAC because it was superseded and because the conditions precedent were never satisfied, the actual policies that were in effect at the relevant time specifically reject any Fee Exception. No later than 2017, Cisco’s Software License Transfer and Re-Use Policy (“Policy”) was revised to remove the Fee Exception. The language quoted by Dexon simply does not appear anywhere within that document, nor does it appear in the 2018 Policy, which is still in effect, governs the conduct occurring during the relevant period from 2019-2021, and is materially identical to the 2017 Policy. Thus, there is no good faith basis for Dexon’s PFAC to allege that the relevant products were subject to the type of licensing Fee Exception, which Cisco last published during 2014. Even more significantly, the Fee Exception that Dexon’s PFAC relies upon is directly contradicted by the Policy applicable to the relevant period.

The relevant Policy directs that a transferee must pay a licensing fee to Cisco, without exception. “An authorized transfer [of a software license] occurs when the licensee conveys or assigns the Software license to another entity after receipt of Cisco’s consent and **payment of any applicable license fee**. . . .” See attached 2017 Policy, p. 1; see also attached 2018 Policy, p. 1 (emphasis added). The amount of the license fee is explicitly defined as “equal to the fee for a new individual Software license as specified in the then-current [Global Price List] applicable to the Cisco entity in the territory where the transferee is located.” *Id.* Contrary to the 2012 Fee Exception, the effective Policy directs that where there is no separately published license fee, the license transfer fee is not waived as Dexon’s PFAC supposes, but instead the transferee must pay Cisco its “then-current applicable software relicensing fee.” *Id.*

Based upon the forgoing, I cannot identify any legitimate grounds for Dexon to file the PFAC, and I do not see any way that it could further amend the PFAC in a manner that would conform with Rule 11. Given all of this, I hope that Dexon will give serious thought to whether it makes sense to pursue yet another set of amendments.

Feel free to call me if there is anything you would like to discuss.

-Lou

From: Lafeber, Michael <MLafeber@Taftlaw.com>

Sent: Tuesday, April 26, 2022 8:13 AM

To: Feuchtbaum, Louis P. <lfeuchtbaum@sideman.com>

Cc: Balthazor, O. Joseph Jr. <JBalthazor@Taftlaw.com>; Lagergren, Christopher <CLagergren@Taftlaw.com>; Amanda R. Washton <a.washton@conklelaw.com>

Subject: RE: Cisco v. Dexon / Amendment to Counterclaims

Lou,

Thanks for the response. One of my main goals is judicial economy. It seems practical to get this issue resolved – either via a stipulation or a motion to amend - prior to addressing Cisco's forthcoming motion to dismiss.

To clarify – Dexon contends the newly discovered EULA language is highly relevant regardless of whether it was last used in 2014. As alleged in Dexon's proposed amendments, Dexon has sold *and will continue to sell Cisco products from as early as 2009 forward* – including model years 2012-2014 (both new, unopened, in the box products, as well as used products). Dexon alleges that Cisco has published, and continues to publish, communications advising secondary market consumers that such products are governed by a purported EULA which prohibits the sale and subsequent use of such products on the secondary market. Dexon contends the embedded software was not licensed but rather sold, and that any purported EULA is invalid or unenforceable. Regardless, Cisco's publications/communications fail to distinguish or make an exception for products governed by the apparent 2012-2014 EULA language. At a minimum, a justiciable controversy exists concerning whether or not Cisco's publications/communications are false and misleading concerning Dexon's current and future sales of products governed by the apparent 2012-2014 EULA language.

One option would be to submit a stipulation seeking an extension of the due date for Cisco's motion to dismiss pending a resolution of the proposed amendment. This would give the parties an opportunity to further investigate the facts. (It makes sense for any proposed amendment to be based on the actual facts.) It also gives Cisco more time to decide whether it is amenable to stipulating or whether it will require Dexon to bring a motion to amend. Lastly, it defers Cisco's motion to dismiss until the amendment issue is resolved. I'm amenable to preparing the first DRAFT.

Let me know your thoughts. Thanks. (Dexon reserves all of its rights.)

From: Feuchtbaum, Louis P. <lfeuchtbaum@sideman.com>

Sent: Monday, April 25, 2022 6:44 PM

To: Lafeber, Michael <MLafeber@Taftlaw.com>

Cc: Balthazor, O. Joseph Jr. <JBalthazor@Taftlaw.com>; Lagergren, Christopher <CLagergren@Taftlaw.com>; Amanda R. Washton <a.washton@conklelaw.com>

Subject: RE: Cisco v. Dexon / Amendment to Counterclaims

[EXTERNAL MESSAGE]

This Message originated outside your organization.

Hi Mike,

I appreciate your sending the contemplated amended counterclaims. I just wanted to write to acknowledge that I've received them and let you know that I believe I can inform you sometime tomorrow whether we can stipulate to Dexon filing these. The only issue for Cisco is whether the language you've cited is relevant to the products at issue. My present understanding is that the new language that Dexon has cited last appeared in a 2014

document, which would predate the allegations in Dexon's amended counterclaims. We are looking for the documents that would apply for the relevant time period and will share those with you, whatever they might say.

Of course, if the exception to license fees Dexon has cited is applicable, I expect that we would stipulate to the amendment. I will be getting back to you as soon as I have definitive answers. Feel free to give me a call if you'd like to discuss anything.

-Lou



Louis P. Feuchtbaum
Partner

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From: Lafeber, Michael <MLafeber@Taftlaw.com>
Sent: Monday, April 25, 2022 12:35 PM
To: Feuchtbaum, Louis P. <lfeuchtbaum@sideman.com>
Cc: Balthazor, O. Joseph Jr. <JBalthazor@Taftlaw.com>; Lagergren, Christopher <CLagergren@Taftlaw.com>; Amanda R. Washton <a.washton@conklelaw.com>
Subject: RE: Cisco v. Dexon / Amendment to Counterclaims

Lou,

In follow-up to my email below, attached please find the following:

1. Dexon's [PROPOSED] Fourth Amended Answer and Counterclaims (Redline Version) incorporating the newly discovered information concerning Cisco's 2012 EULA; and
2. [PROPOSED] Stipulation and Joint Application for Leave to File.

Our goal was to get this to you as soon as possible, in part to avoid Cisco having to file its motion to dismiss in advance of any proposed amendments. Accordingly, it's possible the PROPOSED Fourth Amended Counterclaims could still be tweaked/revised slightly to fix typos and style issues. No substantive changes expected. We will provide any revisions before a stip is finalized. If Cisco is willing to stipulate, we will file ASAP and follow-up w/ the court in light of the current 4/27 deadline. Absent a stipulation, Dexon will be filing a motion for leave to amend.

Your anticipated cooperation is appreciated. Give me a call if you have any questions or want to discuss. Thanks.

Taft / **Michael M. Lafeber**
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From: Lafeber, Michael <MLafeber@Taftlaw.com>
Sent: Thursday, April 21, 2022 11:10 AM
To: Feuchtbaum, Louis P. <lfeuchtbaum@sideman.com>
Cc: Balthazor, O. Joseph Jr. <JBalthazor@Taftlaw.com>; Lagergren, Christopher <CLagergren@Taftlaw.com>
Subject: Cisco v. Dexon / Amendment to Counterclaims

Lou,

Dexon just learned new information relevant to its counterclaims. Namely, Dexon has learned that Cisco's 2012 EULA contains language expressly allowing the use/transfer of embedded software on the secondary market. On information and belief, Cisco's 2012 EULA provides:

Exceptions

1. **Software Bundled with Hardware:** In situations where Products combine Hardware and Software and there is no separate Product code or License Fee charged for the Software on the applicable Cisco then-current published price list at the time of transfer (and therefore a separate License Fee for the Software cannot be determined), an exception will be made to allow for the transfer without the transferee being required to pay a new License Fee.

Dexon continues to evaluate/investigate, but this 2012 provision/language is relevant to Dexon's counterclaims. Accordingly, Dexon presently intends to amend its counterclaims to incorporate these facts/allegations. Having just learned of this information, we do not yet have the PROPOSED Amended version drafted. However, I wanted to let you know ASAP because I know Cisco is working on a motion to dismiss. I will provide the PROPOSED Amended Counterclaims for your review ASAP (along with a PROPOSED Stipulation allowing the Amendment.) The PROPOSED Stipulation will also include a revised due date for Cisco's responsive pleading. Give me a call if you have questions or want to discuss. Cisco's anticipated cooperation is appreciated.

Taft / **Michael M. Lafeber**, Partner
Intellectual Property/Patent
Direct: 612.977.8472 | Office Ext: 28472
Taft Office: Minneapolis

EXHIBIT B

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Attorneys for Defendant, Counterclaim
 Plaintiff and Third-Party Plaintiff Dexon
 Computer, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

CISCO SYSTEMS, INC., a Delaware
 corporation and CISCO TECHNOLOGY,
 INC., a California corporation,

Plaintiffs,

v.

DEXON COMPUTER, INC., a Minnesota
 corporation,

Defendant.

DEXON COMPUTER, INC., a Minnesota
 corporation,

Counterclaim Plaintiff and
 Defendant,

v.

Case No. 3:20-CV-4926-CRB

**DEFENDANT'S ~~THIRD~~ PROPOSED
FOURTH AMENDED ANSWER,
 AFFIRMATIVE DEFENSES,
 COUNTERCLAIMS AND THIRD-
 PARTY CLAIMS**

Hon. Charles R. Breyer
 Presiding Judge

Trial Date: None

1 CISCO SYSTEMS, INC., a Delaware
2 corporation and CISCO TECHNOLOGY,
3 INC., a California corporation,

4 Counterclaim Defendants
and Plaintiffs.

5 DEXON COMPUTER, INC., a Minnesota
6 corporation,

7 Third-Party Plaintiff,

8 v.

9 ATLANTIX GLOBAL SYSTEMS
10 INTERNATIONAL, LLC, BIZCOM
11 ELECTRONICS, INC., DIGI DEVICES
12 ONLINE, ENTERPRISE BUSINESS
13 TECHNOLOGIES, INC., FIBER CABLE
14 CONNECTIONS, MJSI, MULTIMODE
15 TECHNOLOGIES, LLC, OPTIMUM
16 DATA, INC., PARAGON, PURE
FUTURE TECHNOLOGY, INC.,
SEASTAR IT TRADING LLC, SERVER
TECH SUPPLY, SOFTNETWORKS,
INC., STRADA NETWORKS, LLC,
TEKSAVERS, UNLIMITED NETWORK
SOLUTIONS, and WISECOM
TECHNOLOGIES,

17 Third-Party Defendants,
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Defendant Dexon Computer, Inc. (“Dexon”), by and through its undersigned counsel, for its Answer, denies each and every allegation in Plaintiffs Cisco Systems, Inc. and Cisco Technology Inc.’s (“Plaintiffs”) First Amended Complaint (“Complaint”) except as expressly admitted, qualified or otherwise responded to herein and denies that Plaintiffs are entitled to any of the relief requested in their Prayer for Relief. In response to each of the numbered paragraphs of the Complaint, Dexon states as follows. To the extent the headings or any other non-numbered statements in the Complaint contain allegations, Dexon denies each and every such allegation.

INTRODUCTION

1. Dexon denies the allegations of paragraph 1 of the Complaint.

2. Dexon denies the allegations of paragraph 2 of the Complaint.

THE PARTIES

3. Dexon lacks sufficient information to admit or deny the allegations of paragraph 3 of the Complaint, and on that basis Dexon denies those allegations.

4. Dexon admits the allegations of paragraph 4 of the Complaint.

5. Dexon denies the allegations of paragraph 5 of the Complaint.

JURISDICTION AND VENUE

6. ~~Admits~~Dexon admits that the Complaint purports to be one “founded upon violations of Federal trademark laws” but denies any such purported claims have legal or factual merit. The remaining allegations in paragraph 6 of the Complaint are legal conclusions and questions of law regarding jurisdiction to which no response is required. To the extent a response is required, Dexon denies such allegations.

7. Dexon denies the allegations of paragraph 7 of the Complaint.

8. Dexon denies the allegations of paragraph 8 of the Complaint.

9. Dexon denies the allegations of paragraph 9 of the Complaint.

10. Dexon denies the allegations of paragraph 10 of the Complaint.

11. Dexon denies the allegations of paragraph 11 of the Complaint.

FACTUAL ALLEGATIONS

Alleged Cisco Business and History

12. Dexon lacks sufficient information to admit or deny the allegations of paragraph 12 of the Complaint, and on that basis Dexon denies those allegations.

13. Dexon lacks sufficient information to admit or deny the allegations of paragraph 13 of the Complaint, and on that basis Dexon denies those allegations.

14. Dexon lacks sufficient information to admit or deny the allegations of paragraph 14 of the Complaint, and on that basis Dexon denies those allegations.

Alleged Cisco Trademarks

15. Dexon lacks sufficient information to admit or deny the allegations of paragraph 15 of the Complaint, and on that basis Dexon denies those allegations.

16. Dexon lacks sufficient information to admit or deny the allegations of paragraph 16 of the Complaint, and on that basis Dexon denies those allegations.

17. Dexon lacks sufficient information to admit or deny the allegations of paragraph 17 of the Complaint, and on that basis Dexon denies those allegations.

18. Dexon lacks sufficient information to admit or deny the allegations of paragraph 18 of the Complaint, and on that basis Dexon denies those allegations.

Alleged Counterfeit “Cisco” Products

19. Dexon lacks sufficient information to admit or deny the allegations of paragraph 19 of the Complaint, and on that basis Dexon denies those allegations.

20. Dexon lacks sufficient information to admit or deny the allegations of paragraph 20 of the Complaint, and on that basis Dexon denies those allegations.

Alleged Impact on Health, Safety, and National Security Caused by Counterfeit Cisco Products

21. Dexon lacks sufficient information to admit or deny the allegations of paragraph 21 of the Complaint, and on that basis Dexon denies those allegations.

22. Dexon lacks sufficient information to admit or deny the allegations of paragraph 22 of the Complaint, and on that basis Dexon denies those allegations.

Dexon's Alleged History and Practice of Trafficking in Counterfeit Cisco Products

23. Dexon admits selling product bearing the Cisco name and/or mark, but denies the remaining allegations of paragraph 23 of the Complaint, including, without limitation, any allegation such product was counterfeit.

24. Dexon denies the allegations of paragraph 24 of the Complaint.

25. Dexon denies the allegations of paragraph 25 of the Complaint.

Alleged Activity Prior to 2015 Purportedly Demonstrating Dexon's Pattern and Practice of Knowingly Trafficking in Counterfeit Cisco Products

Alleged July 27, 2006 Sale of Counterfeit Cisco Products to a Cisco Investigator (Reston, Virginia)

26. Dexon denies the allegations in paragraph 26 of the Complaint. Plaintiffs previously commenced a lawsuit against Dexon in 2011 including claims based directly on such allegations which were resolved via a confidential settlement agreement and dismissed with prejudice.

FBI's Seizure of Alleged Counterfeit Cisco Products from Dexon on February 26, 2008

27. Dexon admits the Federal Bureau of Investigation ("FBI") executed a search warrant at Dexon's business location on or about February 26, 2008, but denies the remaining allegations in paragraph 27 of the Complaint including, without limitation, any allegation, suggestion or implication any or "all" of the product taken by the FBI was determined to be counterfeit. Plaintiffs previously commenced a lawsuit against Dexon in 2011 including claims based directly on such allegations which were resolved via a confidential settlement agreement and dismissed with prejudice.

Cisco's March 2008 Cease and Desist Letter to Dexon and its CEO

28. Dexon admits Plaintiffs sent a letter addressed to Dexon's President and CEO Steve O'Neil on or about March 7, 2008, and that Dexon responded via a letter from its counsel on or about March 18, 2008, but Dexon denies the reminder of the allegations in paragraph 28 of the Complaint, including, without limitation, Plaintiffs' attempted

1 characterizations of the letters or communications which speak for themselves. Plaintiffs
 2 previously commenced a lawsuit against Dexon in 2011 including claims based directly on
 3 such allegations which were resolved via a confidential settlement agreement and dismissed
 4 with prejudice.

5 **Dexon's June 2010 Sale of Alleged Counterfeit Cisco Products to**
 6 **~~WayneState~~Wayne State University (Detroit, Michigan) and Cisco's**
 7 **C&D Letter**

8 29. Dexon admits selling and shipping Cisco product to Wayne State University
 9 on or about February 21, 2010 but denies the remainder of the allegations in paragraph 29
 10 of the Complaint, including, without limitation, any allegation the product involved was
 11 counterfeit. Plaintiffs previously commenced a lawsuit against Dexon in 2011 including
 12 claims based directly on such allegations which were resolved via a confidential settlement
 13 agreement and dismissed with prejudice.

14 30. Dexon admits Plaintiffs sent a letter addressed to Dexon's President and CEO
 15 Steve O'Neil on or about August 6, 2010 concerning Dexon's sale of Cisco product to
 16 Wayne State University, but Dexon denies the reminder of the allegations in paragraph 30
 17 of the Complaint, including, without limitation, Plaintiffs' attempted characterization of the
 18 letter which speaks for itself. Plaintiffs previously commenced a lawsuit against Dexon in
 19 2011 including claims based directly on such allegations which were resolved via a
 20 confidential settlement agreement and dismissed with prejudice.

21 31. Dexon admits it responded via a letter from counsel to ~~Plaintiff~~Plaintiffs's
 22 Wayne State University allegations on or about August 23, 2010, but Dexon denies the
 23 reminder of the allegations in paragraph 31 of the Complaint, including, without limitation,
 24 Plaintiffs' attempted characterization of the letter which speaks for itself. Plaintiffs
 25 previously commenced a lawsuit against Dexon in 2011 including claims based directly on
 26 such allegations which were resolved via a confidential settlement agreement and dismissed
 27 with prejudice.

32. Dexon admits Plaintiffs sent a follow-up letter concerning or relating to the Wayne State University allegations on or about August 30, 2010, but Dexon denies the reminder of the allegations in paragraph 32 of the Complaint, including, without limitation, Plaintiffs' attempted characterization of the letter which speaks for itself. Plaintiffs previously commenced a lawsuit against Dexon in 2011 including claims based directly on such allegations which were resolved via a confidential settlement agreement and dismissed with prejudice.

Dexon's July 2010 Sale of Alleged Counterfeit Cisco Products to a Cisco Investigator (Los Angeles, California)

33. Dexon denies the allegations in paragraph 33 of the Complaint. Plaintiffs previously commenced a lawsuit against Dexon in 2011 including claims based directly on such allegations which were resolved via a confidential settlement agreement and dismissed with prejudice.

Dexon's Alleged Illegal Conduct Giving Rise to the Present Lawsuit

34. Dexon denies the allegations in paragraph 34 of the Complaint.

Dexon's July 2015 Sale of Alleged Counterfeit Cisco Product to Things Remembered, Inc. (Highland Heights, Ohio) and Cisco's C&D Letter

35. Dexon admits selling Cisco product to Things Remembered, Inc. on or about July 2015, but denies the remainder of the allegations in paragraph 35 of the Complaint, including any allegation the product was counterfeit.

36. Dexon admits Plaintiffs sent a letter addressed to Dexon's counsel relating to the Things Remembered, Inc. allegations on or about August 27, 2020 and that Dexon responded thereto, but Dexon denies the reminder of the allegations in paragraph 36 of the Complaint, including, without limitation, Plaintiffs' attempted characterizations of the letters or communications which speak for themselves.

Dexon's December 2016 Sale of Alleged Counterfeit Cisco Products to Jack Henry & Associates, Inc. (Monett, Missouri) and Cisco's C&D Letter

37. Dexon admits selling Cisco product to Jack Henry & Associates, Inc. (“Jack Henry”) on or about December 2016, but denies the remainder of the allegations in paragraph 37 of the Complaint, including, without limitation, any allegation the product was counterfeit.

38. Dexon admits Plaintiffs sent a letter addressed to Dexon’s counsel relating to the Jack Henry allegations, but Dexon denies the reminder of the allegations in paragraph 38 of the Complaint, including, without limitation, Plaintiffs’ attempted characterization of the letter which speaks for itself.

39. Dexon admits it responded to Plaintiffs’ Jack Henry allegations via a letter from Dexon’s counsel, but denies the reminder of the allegations in paragraph 39 of the Complaint, including, without limitation, Plaintiffs’ attempted characterizations of the responsive letter which speaks for itself.

Dexon’s October 2017 Sale of Alleged Counterfeit Cisco Products to a Cisco Investigator (Berkeley, California)

40. Dexon denies the allegations in paragraph 40 of the Complaint.

Dexon’s January 2018 Sale of Alleged Counterfeit Cisco Product to Community Health Alliance (Reno, Nevada) and Cisco’s C&D Letter

41. Dexon admits selling Cisco product to Community Health Alliance (“CHA”) on or about January 2018, but denies the remainder of the allegations in paragraph 41 of the Complaint, including, without limitation, any allegation the product was counterfeit.

42. Dexon admits Plaintiffs and Dexon’s counsel exchanged a series of letters or communications relating to the CHA allegations, but denies the remainder of the allegations in paragraph 42 of the Complaint, including, without limitation, Plaintiffs’ attempted characterizations of the letters or communications which speak for themselves.

Dexon’s April 2018 Sale of Alleged Counterfeit Cisco Products to Tucson Medical Center (Arizona)

1 43. Dexon admits selling Cisco product to Tucson Medical Center (“TMC”) on
2 or about April 2018, but denies the remainder of the allegations in paragraph 43 of the
3 Complaint, including, without limitation, any allegation the product was counterfeit.

4
5 **Dexon’s April 2018 Sale of Alleged Counterfeit Cisco Products to**
6 **DARCARS (Maryland) and Cisco’s C&D Letter**

7 44. Dexon admits selling Cisco product to DARCARS on or about April 2018,
8 but denies the remainder of the allegations in paragraph 44 of the Complaint, including,
9 without limitation, any allegation the product was counterfeit.

10 45. Dexon admits Plaintiffs sent a letter addressed to Dexon’s counsel relating to
11 the DARCARS allegations, but Dexon denies the reminder of the allegations in paragraph
12 45 of the Complaint, including, without limitation, Plaintiffs’ attempted characterization of
13 the letter which speaks for itself.

14 **Dexon’s August 2018 Sale of Alleged Counterfeit Cisco Products to**
15 **Lockridge, Grindal, Nauen, PLLP (Minneapolis, Minnesota)**

16 46. Dexon admits selling Cisco product to Lockridge, Grindal, Nauen, PLLP on
17 or about August 2018, but denies the remainder of the allegations in paragraph 46 of the
18 Complaint, including, without limitation, any allegation the product was counterfeit.

19 **Dexon’s August 2018 Sale of Alleged Counterfeit Cisco Products to**
20 **Regional Justice Information Service (St. Louis, MO) and Cisco’s C&D**
21 **Letter**

22 47. Dexon admits selling Cisco product to Regional Justice Information Service
23 (“RJIS”) on or about August 2018, but denies the remainder of the allegations in paragraph
24 47 of the Complaint, including, without limitation, any allegation the product was
25 counterfeit.

26 48. Dexon admits Plaintiffs sent a letter addressed to Dexon’s counsel relating to
27 the RJIS allegations, but Dexon denies the reminder of the allegations in paragraph 48 of
28

1 the Complaint, including, without limitation, Plaintiffs’ attempted characterization of the
2 letter which speaks for itself.

3 **Dexon’s Purchases in 2018 of Alleged Counterfeit Switches from**
4 **PureFutureTech (Fremont, California)**

5 49. Dexon admits purchasing Cisco product from PureFutureTech on or about
6 2018 and that the purported supplier of such product was HongKong Sellsi, a former
7 authorized licensed seller of Cisco products, but lacks sufficient information to admit or
8 deny the remaining allegations of paragraph 49 of the Complaint, and on that basis Dexon
9 denies such allegations.

10 50. Dexon admits Plaintiffs served it with a subpoena relating to a lawsuit
11 involving Plaintiffs, PureFutureTech and HongKong Sellsi and that Plaintiffs were
12 ultimately required to file a motion relating to such non-party subpoena. Dexon denies the
13 remaining allegations of paragraph 50 of the Complaint, including, without limitation, any
14 allegation, suggestion or implication Dexon “refused to cooperate” with, or in any way
15 failed to meet its obligations arising from, the subpoena.

16 **Dexon’s Purchases in 2017 to 2019 of Alleged Counterfeit Transceivers**
17 **from ~~Pure Future Tech~~ PureFutureTech, Inc. (Fremont, California)**

18 51. Dexon admits purchasing Cisco product from ~~Pure—Future~~
19 ~~Tech~~ PureFutureTech, Inc. in the period 2017-2019 but denies any such product was
20 counterfeit. Dexon lacks sufficient information to admit or deny the remaining allegations
21 in paragraph 51 of the Complaint and on that basis denies such allegations.

22 52. Dexon denies the allegations in paragraph 52 of the Complaint, including,
23 without limitation, any allegation Dexon knew or reasonably should have known any Cisco
24 product was allegedly counterfeit, or that Dexon was willfully blind to such alleged fact.

25 **Dexon’s Sales of Alleged Counterfeit Products to Murray State**
26 **University (Murray, Kentucky) in 2018 and 2019 and Cisco’s C& Letter**

53. Dexon admits selling Cisco product to Murray State University (“MSU”) in or about 2018 and 2019, but denies the remainder of the allegations in paragraph 53 of the Complaint, including, without limitation, any allegation the product was counterfeit.

54. Dexon admits Plaintiffs sent a letter addressed to Dexon’s counsel relating to the MSU allegations, but Dexon denies the reminder of the allegations in paragraph 54 of the Complaint, including, without limitation, Plaintiffs’ attempted characterization of the letter which speaks for itself.

Dexon’s July 2019 Sale of Alleged Counterfeit Cisco Products to MedRisk (King of Prussia, Pennsylvania)

55. Dexon admits selling Cisco product to MedRisk on or about July 2019, but denies the remainder of the allegations in paragraph 55 of the Complaint, including, without limitation, any allegation the product was counterfeit.

Dexon’s September 2019 Sale of Alleged Counterfeit Cisco Products to Coppell Independent School District (Coppell, Texas) and Cisco’s C&D Letter

56. Dexon admits selling Cisco product to Coppell Independent School District (“CISD”) on or about September 2019, but denies the remainder of the allegations in paragraph 56 of the Complaint.

57. Dexon denies any allegation, suggestion or implication in paragraph 57 of the Complaint that Cisco product it sold to CISD was counterfeit. Dexon lacks sufficient information to admit or deny the remainder of the allegations in paragraph 57 of the Complaint and on that basis denies such allegations.

58. Dexon admits Plaintiffs sent a letter addressed to Dexon’s counsel relating to the CISD allegations, but Dexon denies the reminder of the allegations in paragraph 58 of the Complaint, including, without limitation, Plaintiffs’ attempted characterization of the letter which speaks for itself.

Dexon’s Alleged California Directed Conduct Identified Through Jurisdictional Discovery

59. Dexon admits Plaintiffs conducted jurisdictional discovery herein, but denies the remainder of the allegations in paragraph 59 of the Complaint, including, without limitation, Plaintiffs' characterization of such jurisdictional discovery, as well as any allegation such discovery revealed any "illegal and tortious" conduct by Dexon in California or elsewhere.

Dexon's Sale of Alleged Counterfeit Cisco Products to California Customers

60. Dexon denies the allegations in paragraph 60 of the Complaint.

Dexon's Sale of Alleged Counterfeit Cisco Licenses to California Customers

61. Dexon admits Cisco has transmitted software licenses via Product Activation Key Certificates ("PAK") and that such PAKs have included a code that allows users to utilize the subject software. Dexon denies the remainder of the allegations in paragraph 61 of the Complaint.

62. Dexon denies the allegations in paragraph 62 of the Complaint.

63. Dexon denies the allegations in paragraph 63 of the Complaint.

64. Dexon denies the allegation in paragraph 64 of the Complaint.

**FIRST PURPORTED CLAIM FOR RELIEF
Federal Trademark Infringement
(15 U.S.C. § 1114)**

65. Dexon restates and incorporates by reference its responses to the allegations in paragraphs 1-64 in response to the allegations in paragraph 65 of the Complaint.

66. Dexon denies the allegations of paragraph 66 of the Complaint.

67. Dexon denies the allegations of paragraph 67 of the Complaint.

68. Dexon denies the allegations of paragraph 68 of the Complaint.

69. Dexon denies the allegations of paragraph 69 of the Complaint.

70. Dexon denies the allegations of paragraph 70 of the Complaint.

71. Dexon denies the allegations of paragraph 71 of the Complaint.

72. Dexon denies the allegations of paragraph 72 of the Complaint.

SECOND PURPORTED CLAIM FOR RELIEF
Federal Trademark Counterfeiting
(15 U.S.C. § 1114)

73. Dexon restates and incorporates by reference its responses to the allegations in paragraphs 1-72 in response to the allegations in paragraph 73 of the Complaint.

74. Dexon denies the allegations of paragraph 74 of the Complaint.

75. Dexon denies the allegations of paragraph 75 of the Complaint.

76. Dexon denies the allegations of paragraph 76 of the Complaint.

77. Dexon denies the allegations of paragraph 77 of the Complaint.

78. Dexon denies the allegations of paragraph 78 of the Complaint.

79. Dexon denies the allegations of paragraph 79 of the Complaint.

THIRD PURPORTED CLAIM FOR RELIEF
False Designation of Origin
(15 U.S.C. § 1125)

80. Dexon restates and incorporates by reference its responses to the allegations in paragraphs 1-79 in response to the allegations in paragraph 80 of the Complaint.

81. Dexon denies the allegations of paragraph 81 of the Complaint

82. Dexon denies the allegations of paragraph 82 of the Complaint.

83. Dexon denies the allegations of paragraph 83 of the Complaint.

84. Dexon denies the allegations of paragraph 84 of the Complaint.

85. Dexon denies the allegations of paragraph 85 of the Complaint.

FOURTH PURPORTED CLAIM FOR RELIEF
California Unfair Business Practices
(Cal. Bus. & Prof. Code §§ 17200 et seq.)

86. Dexon restates and incorporates by reference its responses to the allegations in paragraphs 1-85 in response to the allegations in paragraph 86 of the Complaint.

87. The allegations in paragraph 87 of the Complaint are legal conclusions of law regarding California Business and Professions Code §§ 17200 et seq to which no response is required. To the extent such allegations imply or suggest Dexon has in any way violated California Business and Professions Code §§ 17200 et seq Dexon denies such allegations.

88. Dexon denies the allegations of paragraph 88 of the Complaint.

1 89. Dexon denies the allegations of paragraph 89 of the Complaint.

2 90. Dexon denies the allegations of paragraph 90 of the Complaint.

3 91. Dexon denies the allegations of paragraph 91 of the Complaint.

4 92. Dexon denies the allegations of paragraph 92 of the Complaint.

5 **FIFTH PURPORTED CLAIM FOR RELIEF**
 6 **Unjust Enrichment**
 6 **(Common Law)**

7 93. Dexon restates and incorporates by reference its responses to the allegations
 8 in paragraphs 1-92 in response to the allegations in paragraph 93 of the Complaint.

9 94. Dexon admits the allegations of paragraph 94 of the Complaint.

10 95. Dexon denies the allegations of paragraph 95 of the Complaint.

11 **AFFIRMATIVE DEFENSES**

12 Without admitting any wrongful conduct on the part of Dexon, and without
 13 admitting that Plaintiffs claims have any merit or that Plaintiffs have suffered any loss,
 14 damage, or injury, Dexon alleges the following affirmative defenses to the Complaint. By
 15 designating the following as affirmative defenses, Dexon does not in any way waive or
 16 limit any defenses which are or may be raised by their denial, allegations, and averments
 17 set forth herein. These defenses are pled in the alternative, are raised to preserve the rights
 18 of Dexon to assert such defenses, and are without prejudice to Dexon's ability to raise
 19 other and further defenses. Dexon expressly reserves all rights to reevaluate their defenses
 20 and/or assert additional defenses upon discovery and review of additional documents and
 21 information, upon the development of other pertinent facts, and during pretrial proceedings
 22 in this action. Dexon expressly incorporate all allegations of its Answer, Counterclaims
 23 and Cross-Claims as if fully set forth in each of the following affirmative defenses.

24 **FIRST AFFIRMATIVE DEFENSE**
 25 **(Res Judicata and Collateral Estoppel)**

26 96. Plaintiffs' claims and/or recovery are barred, in whole or in part, by the
 27 doctrines of res judicata and collateral estoppel.

28 **SECOND AFFIRMATIVE DEFENSE**

(Laches)

97. Plaintiffs' claims and/or recovery are barred, in whole or in part, by the doctrine of laches. Plaintiffs' have had longstanding knowledge concerning the legal open or "secondary" market for its products and have proactively engaged in unfair and tortious behavior in an effort to selectively manipulate and control such secondary market to their advantage. Plaintiffs have had longstanding specific knowledge of Dexon's activity in the legal secondary market since well before 2011, yet have failed to take timely action to assert their claims herein, resulting in substantial prejudice to Defendants.

THIRD AFFIRMATIVE DEFENSE**(Estoppel)**

98. Plaintiffs' claims and/or recovery are barred, in whole or in part, by the doctrine of estoppel. Plaintiffs' advertises that consumers can purchase their products from their "Authorized Channel Partners" or "Authorized Resellers." Plaintiffs have known, or should have known such "Authorized Channel Partners" and/or "Authorized Resellers" participate in and sell their products on the secondary market. Plaintiffs have allowed these "Authorized Channel Partners" and/or "Authorized Resellers" to maintain their "authorized" status despite knowledge of their participation in the secondary market, including evidence of their sale of counterfeit Cisco products. Plaintiffs know, or should have reasonably known, that secondary market resellers such as Dexon rely upon Plaintiffs' endorsement of such "authorized" vendors when sourcing Cisco products, including, without limitation, procuring Cisco product from such "authorized vendors" end customers. Plaintiffs have also actively contributed to the presence of counterfeit product in the marketplace by, without limitation, failing to properly police and control their manufacturers and failing to properly manage their product serial numbers. As one example, Plaintiffs "authorized" vendors intentionally modify or change product serial numbers in order to ensure the subject product(s) qualify for Plaintiffs' SmartNet service

1 packages. Plaintiffs are therefore estopped from pursuing claims against Dexon or seeking
2 damages related to alleged counterfeit products.

3 **FOURTH AFFIRMATIVE DEFENSE**
4 **(First Sale Doctrine and Exhaustion)**

5 99. Plaintiffs' claims and/or recovery are barred, in whole or in part, by the first
6 sale doctrine, which protects secondary market resellers such as Dexon from liability for
7 the purchase, importation, and resale of genuine Cisco products and exhausts Plaintiffs'
8 rights in further transactions.

9 **FIFTH AFFIRMATIVE DEFENSE**
10 **(Statutes of Limitations)**

11 100. Plaintiffs' claims and/or recovery are barred, in whole or in part, by
12 applicable statutes of limitations, including but not limited to CAL. CIV. PROC. CODE §§
13 337–38, CAL. BUS. & PROF. CODE § 17208, and 17 U.S.C. § 507. Some or all of
14 Plaintiffs' claims involve conduct outside of the applicable statutes of limitations.

15 **SIXTH AFFIRMATIVE DEFENSE**
16 **(Waiver)**

17 101. Plaintiffs' claims and/or recovery are barred, in whole or in part, by the
18 doctrine of waiver. Plaintiffs have promoted and advertised its “authorized” sellers despite
19 having full knowledge certain such “authorized” sellers: i) have been caught selling
20 counterfeit product; and ii) actively and regularly deal with secondary market resellers such
21 as Dexon. Secondary market resellers such as Dexon have understandably relied upon
22 Plaintiffs' promotion and endorsement of such “authorized” sellers when sourcing Cisco
23 products for their customers. Plaintiffs have also intentionally failed or refused to provide
24 or offer their claimed “tools” for detecting counterfeit product to secondary market resellers
25 such as Dexon, and have actively contributed to the presence of counterfeit product in the
26 marketplace by, without limitation, failing to properly police and control their
27 manufacturers and failing to properly manage their product serial numbers. Plaintiffs have
28 also had longstanding specific knowledge of Dexon's activity in the legal secondary market

1 since well before 2011, yet have failed to take timely action to assert their claims herein.
 2 Accordingly, Plaintiffs have waived any claims related to Dexon's unwitting sale of alleged
 3 counterfeit goods, including any such goods sourced directly or indirectly from Plaintiffs'
 4 "authorized" vendors.

5 **SEVENTH AFFIRMATIVE DEFENSE**
 6 **(Unjust Enrichment)**

7 102. Plaintiffs' claims and/or recovery are barred, in whole or in part, by the
 8 doctrine of unjust enrichment. Plaintiffs have engaged in unfair and tortious practices and
 9 made misrepresentations to consumers regarding: i) the quality and authenticity of products
 10 sold by secondary market resellers such as Dexon; and ii) Plaintiffs' rights to restrict
 11 consumers use and transfer of Cisco hardware and software. Such conduct has improperly
 12 steered customers from Dexon to Plaintiffs and unjustly enriched Plaintiffs.

13 **EIGHTH AFFIRMATIVE DEFENSE**
 14 **(Unclean Hands/Inequitable Conduct)**

15 103. Plaintiffs' claims and/or recovery are barred, in whole or in part, by the
 16 doctrines of unclean hands, inequitable conduct, and similar defenses. Without limitation,
 17 Plaintiffs have: (i) intentionally misled consumers into thinking that genuine products on
 18 the secondary market are used, counterfeit, or stolen, (ii) sold products to resellers whom it
 19 knew, or should have known, were reselling the products on the secondary market, (iii) held
 20 out certain entities as "Authorized Resellers" even though Plaintiffs knew or should have
 21 known these entities sold counterfeit goods, and engaged in other inequitable practices that
 22 bar recovery on its claims.

23 **NINTH AFFIRMATIVE DEFENSE**
 24 **(Redundancy)**

25 104. Plaintiffs' claims and/or recovery are barred, in whole or in part, because they
 26 are redundant and/or duplicative of one another.

27 **TENTH AFFIRMATIVE DEFENSE**
 28 **(Abandonment)**

105. Plaintiffs' claims and/or recovery are barred, in whole or in part, by abandonment of any marks at issue. Plaintiffs' have failed to properly police and exercise adequate quality control over its marks and have thereby abandoned their rights therein.

ELEVENTH AFFIRMATIVE DEFENSE
(Conduct of Others)

106. Plaintiffs' claims and/or recovery are barred, in whole or in part, because the conduct complained of is the conduct of others, including, without limitation, Plaintiffs' "authorized" vendors and/or Plaintiffs' licensed manufacturers.

TWELVE AFFIRMATIVE DEFENSE
(Failure to Mitigate)

107. Plaintiffs' claims and/or recovery are barred, in whole or in part, because Plaintiffs failed to mitigate, minimize, or attempt to avoid damages. Without limitation, Plaintiffs could have pursued legal remedies earlier, assisted secondary market resellers like Dexon in detecting and fighting counterfeit products, and/or properly policed and prevented the manufacture and distribution of counterfeit product within their own manufacturing and distribution network.

THIRTEENTH AFFIRMATIVE DEFENSIVE
(Lack of Personal Jurisdiction)

108. Plaintiffs are barred from pursuing their claims against Dexon in this Court because the Court lacks personal jurisdiction over Dexon.

FOURTEENTH AFFIRMATIVE DEFENSIVE
(Improper Venue)

109. Plaintiffs are barred from pursuing their claims against Dexon in this Court because venue is improper.

FIFTEENTH AFFIRMATIVE DEFENSIVE
(Failure to State a Claim)

110. The Complaint, in whole or in part, fails to state any claim upon which relief can be granted.

SIXTEENTH AFFIRMATIVE DEFENSIVE
(One Satisfaction Rule / Bar on Double Recovery)

111. Plaintiffs' claims and/or recovery are barred, in whole or in part, by the one satisfaction rule and/or the bar on double recoveries.

COUNTERCLAIMS

112. Counterclaim Plaintiff Dexon Computer, Inc. asserts the following counterclaims against Counterclaim Defendants Cisco Systems, Inc., and Cisco Technology, Inc. (hereinafter referred to jointly as "Cisco") alleges as follows:

THE PARTIES

113. Defendant and Counterclaim Plaintiff Dexon Computer, Inc. ("Dexon") is a Minnesota corporation with its principal place of business at 9201 E. Bloomington Freeway, Suite BB, Bloomington, Minnesota 55420.

114. On information and belief, Plaintiff and Counterclaim Defendant Cisco Systems, Inc. ("CSI") is a Delaware corporation with its principal place of business at 170 W. Tasman Drive, San Jose, California 95134.

115. On information and belief, Plaintiff and Counterclaim Defendant Cisco Technology, Inc. ("CTI") is a California corporation with its principal place of business at 170 W. Tasman Drive, San Jose, California 95134.

JURISDICTION

116. This Court has subject matter jurisdiction over Dexon's counterclaims pursuant to 28 U.S.C. §§ 1367 and 1332. Dexon's counterclaims arise out of the same controversy as plaintiffs' Federal claims, there is complete diversity of citizenship between Plaintiffs and Dexon, and the amount in controversy exceeds seventy-five thousand dollars (\$75,000.00), exclusive of interest and costs.

FACTS

The Secondary Market for Cisco Products

117. As with any economic activity where there are significant profits, market forces have operated to create a "secondary" market for Cisco products. On information

1 and belief, authentic or genuine Cisco products come to the secondary market in the United
 2 States in a variety of ways including: (a) Cisco's knowing sale of such products to
 3 secondary market suppliers in the context of either specific end user deals or when Cisco
 4 needs to move inventory; (b) Cisco's authorized resellers' purchase of product in excess of
 5 what they need for a specific end user order and subsequent resale of such product into the
 6 secondary market; (c) Cisco end user's resale of new, unused product; and (d) through
 7 importation of such product from abroad where it has been sold by distributors, resellers,
 8 or end users under similar circumstances. On information and belief, Cisco resists attempts
 9 by end users and resellers to return product, resulting in a natural supply of secondary
 10 market Cisco product.

11 118. Given the substantial profits available from sale of Cisco-branded products,
 12 market forces dictate that a secondary market will develop for such products. These market
 13 forces benefit end users in that they reduce prices for such products.

14 119. Dexon is an independent secondary-market reseller of computer networking
 15 products, including routers, Ethernet switches and other computer hardware. Dexon
 16 provides new, refurbished and discontinued hardware products, including authentic or
 17 genuine products to its customers from leading manufacturers including, without limitation,
 18 Hewlett Packard, Dell, Juniper Networks and Cisco.

19 120. Dexon obtains Cisco products from reliable suppliers, subjects such products
 20 to extensive quality control, and then resells such products to other resellers and to end
 21 users, at a profit but frequently at prices lower than those offered by Cisco "Authorized"
 22 sellers.

23 121. Secondary market resellers of Cisco products, including Dexon, are highly
 24 incentivized to detect and stamp out the sale of counterfeit goods. While a manufacturer
 25 such as Cisco may blame rogue actors when a dissatisfied customer confronts it with a
 26 counterfeit product, an independent reseller's own reputation suffers significantly when it
 27 sells a customer a counterfeit goods. Unsurprisingly, most independent resellers, including
 28 Dexon, take proactive steps to detect and prevent the sale of counterfeit product.

122. Cisco has created an “Authorized Channel Network” in which Cisco sells products to entities it refers to as “Authorized Channel Partners” or “Authorized Resellers.” Within this “Authorized” network, Cisco exerts strict control over how, and at what prices, its “Authorized” partners can buy and sell Cisco products.

123. “Authorized Reseller” status is not foolproof protection against counterfeit products. Cisco’s “Authorized” sellers are likewise victimized by the presence of counterfeit product in the marketplace and have been discovered to be selling counterfeit Cisco product.

124. While manufacturers like Cisco are permitted to control the initial sale of their products, they may not wield trademark or copyright protections to dictate the terms by which their products are resold by other parties. The well-established “first sale doctrine” protects parties who engage in the subsequent resale of Cisco’s products, even if those subsequent resales occur outside the “Authorized” channels. Cisco may not forbid the resale of its products outside the “Authorized” network.

**Cisco’s Improper Intereference With Secondary Market:
Original Transaction a “Sale” not a “License”**

125. Cisco products, like virtually all modern electronics, contain embedded software. And just as a car, refrigerator, or cell phone will not function properly without internal software, Cisco’s products - including the Cisco products resold by Dexon - cannot function without Cisco’s embedded software. Likewise, such embedded software is not intended to be removed and has no independent value to the end consumer separate and apart from the Cisco product with which it is compatible.

126. Cisco uses the fact that its products have embedded software as an attempted end-around the first sale doctrine. It does so by falsely claiming the embedded software is governed by an “End User License Agreement” (“EULA”) which restricts subsequent transfer and use of any Cisco product containing such embedded software.

127. Cisco’s current purported EULA found at <https://www.cisco.com/c/en/us/about/legal/cloud-and->

software/end_user_license_agreement.html defines “Software” broadly to attempt to encompass embedded software. According to the definition, “ ‘Software’ means the Cisco computer programs including Upgrades, firmware and applicable Documentation.”

128. Cisco’s current EULA purports to provide a “non-transferable” license to use the “Software” except “as permitted under the Cisco Software Transfer and Re-Use Policy.” Cisco’s current purported EULA provides:

129. Cisco’s current purported “Software License Transfer and Re-Use Policy” found at https://www.cisco.com/c/dam/en_us/about/doing_business/legal/policy/Cisco_Software_Transfer_and_Relicensing_Policy.pdf provides that products containing embedded software acquired on the secondary market cannot be transferred or used without first paying an additional license fee. Such policy states:

130. As explained in detail below, no valid or enforceable EULA exists covering the embedded software. Rather, the facts and circumstances surrounding the original transactions confirm a sale of such products, including the embedded software, rather than the creation of any alleged or purported license governing the embedded software. Accordingly, Cisco’s attempts to notify secondary market purchasers of the purported EULA after the original sale, as well as Cisco’s repeated and ongoing form publications and advertisements advising secondary market purchasers that they have no right to transfer or use the embedded software, are false and misleading.

~~127.~~131. Cisco’s false claims concerning purported contractual restrictions on the transfer and use of such embedded software are not merely off the cuff “opinion” statements by lower level Cisco employees or representatives. Rather, Cisco has employed an intentional, coordinated, formalized and ongoing effort to utilize such false claims to deter consumers from purchasing Cisco products on the secondary market (including from resellers like Dexon).

128.132. ~~For example~~ In addition to the EULA and Software License Transfer and Re-Use Policy referred to above, Cisco's current official "relicensing" website found at <https://www.cisco.com/c/en/us/products/hw-sw-relicensing-program.html> provides as follows:

Policies Using the Program Product List Frequently Asked Questions

Software

Cisco software—whether it is embedded operating system software or standalone application software—is not transferable unless specifically allowed under the Cisco Software License Transfer and Re-Use Policy. You must have Cisco's written consent and pay a license fee. After a transfer, the previous owner's license to the software is terminated, and the transferee's use of the software is governed by the Cisco End User License Agreement and in accordance with the original license entitlement.

129.133. The same Cisco "relicensing" website advises consumers that the purported embedded software licenses are not transferrable and that any Cisco product purchased on the secondary market must be relicensed. The current "relicensing" website found at <https://www.cisco.com/c/en/us/products/hw-sw-relicensing-program.html#q2>: provides ~~at https://www.cisco.com/c/en/us/products/hw-sw-relicensing-program.html#q2:~~

Q: Is a Cisco software license transferable?

A: No, unless it is specifically allowed under the Cisco Software License Transfer and Re-Use Policy. Cisco software licenses are not transferable from user to user unless otherwise stated by Cisco or required by applicable law. Any purchaser of used or secondary-market Cisco equipment is required to relicense the software. For further details read the [End User License Agreement](#).

130. Cisco's current "FAQ" for "Third Party Maintenance Services and purchase of Cisco Products outside the Authorized Channel" found online at https://www.cisco.com/c/dam/en_us/about/doing_business/legal/service_descriptions/docs/Third_Party_Maintenance_Services_FAQ.pdf expressly states that product purchased on the secondary market from a non "Cisco Channel Partner" does not come with a valid software license:

134.

Q. If I buy Cisco product from a company who is not a Cisco Channel Partner, will I have a valid software license?

A. No, unless the Cisco product successfully passes an inspection and any applicable relicensing fees are paid or it meets an exception contained in Cisco's Software License Transfer and Re-Use Policy.

1 ~~131.~~

2 ~~132.~~135. Cisco also sends vetted and approved form letters from its “Brand
3 Protection Team” to secondary market customers stating that only the “initial purchasers”
4 of Cisco product are entitled to the benefits of the purported EULA. Such letters are
5 intended to scare consumers into believing that products purchased on the secondary market
6 may not work or that ~~they~~such consumers are not authorized to utilize ~~the~~ embedded
7 software contained in Cisco products purchased from secondary market sellers like Dexon.

8 ~~133.~~136. Specifically, Cisco’s “Brand Protection Team” form letters define any
9 Cisco product purchased from secondary market resellers such as Dexon as “unauthorized.”
10 Such form letters then falsely claim that “any” such “unauthorized product does not have a
11 valid software license.”

12 ~~134.~~—For example, a March 14, 2019, Cisco Brand Protection Team form letter to
13 Dexon customer Lockridge Grindal Nauen stated in relevant part:

14 Please be informed Dexon is NOT a member of the Cisco Authorized Reseller Program.
15 Regardless of what Dexon claims, and regardless of whether its Cisco product is used or is in new
sealed boxes, ANY Cisco product it supplies is considered unauthorized.

- 16 1. Unauthorized product is not eligible for any Cisco OEM warranty
- 17 2. Unauthorized product is not automatically eligible for SMARTnet
3. Unauthorized product does not have a valid software license.

18 For a detailed list of authorized Cisco Channel Partners, please refer
19 to <http://www.cisco.com/go/partnerlocator>.

20 The following policy statement applies, whether the product is used or is in new, unopened and
sealed boxes.

21 When products are not sold through Cisco's authorized sales channels, Cisco can offer no
22 assurance as to the provenance, quality, or authenticity of those products. Additionally, when
resellers resell Cisco products that have been sourced from outside of Cisco's authorized sales
23 channels, those products do not come with a valid software license or hardware warranty and are
not automatically eligible for a Cisco service support contract (such as SMARTnet maintenance).

24 137.

1 An overview of Cisco's policy on this subject is as follows:

2 **Licensing.** When Cisco sells its products, software licenses (such as for Cisco IOS) are
 3 granted to the initial purchasers of those products. Cisco's policy is that software may
 4 not be transferred to any other purchaser of the product unless specifically authorized by
 5 Cisco. To the extent that Cisco believes a customer is not an initial purchaser—or if a
 6 customer expresses concern that it is not an initial purchaser—such issues will be
 promptly addressed and Cisco is committed to resolving all licensing issues that arise. In
 full, this policy is set forth on Cisco's
 website: http://www.cisco.com/en/US/prod/cisco_software_transfer_relicensing_policy.html.

7 ~~135~~, 138. Contrary to Cisco's representations, no valid or enforceable license
 8 exists covering the embedded software. Rather, the facts and circumstances surrounding
 9 the original transactions confirm a *sale* of such products, including the embedded software,
 10 rather than the creation of any alleged or purported license governing the embedded
 11 software.

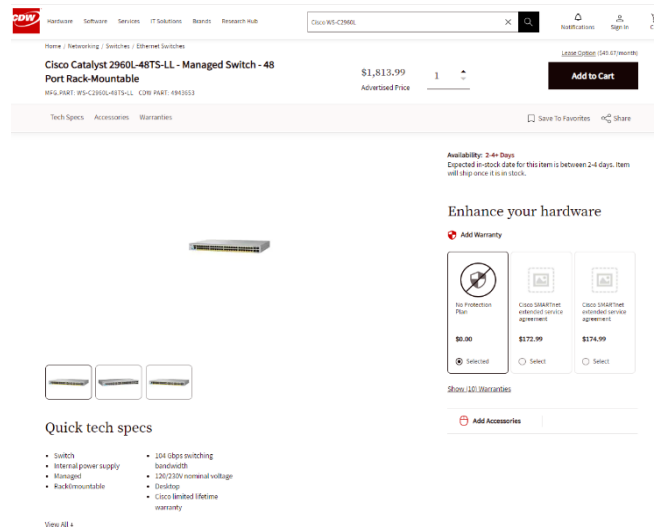
12 **The Purchasing Process**

13 ~~136~~, 139. Cisco sells new, unopened product to its authorized resellers. Upon
 14 information and belief, these sales come in substantial quantities, sometimes in the
 15 thousands of individual products.

16 ~~137~~, 140. Upon information and belief, Cisco's authorized resellers accept the
 17 risk that the brand-new Cisco products, including the embedded software, may be damaged
 18 or lost. Cisco makes it extremely difficult for its authorized resellers to return any products.

19 ~~138~~, 141. Cisco's authorized resellers offer the Cisco products for sale to
 20 consumers. Such authorized resellers make it extremely difficult to for consumers to return
 21 any products.

139,142. As shown and explained below, the original consumer transaction involving the Cisco products is a “sale” of both the hardware and any associated embedded software. There is no creation of a license covering the embedded software. Rather, Cisco’s authorized resellers state that Cisco switches come with a “Cisco limited lifetime warranty” without mention that the warranty is subject to any restrictions or that the product comes embedded with software subject to a license. CDW and other authorized resellers offer additional “[e]nhance[ments]” for the hardware, like Cisco SmartNet extended service agreements.



140,143. Cisco’s authorized reseller’s do not provide original purchasers any notice prior to purchase that there is embedded software in the product or that such embedded software is governed by a license restricting the original purchaser’s ability to transfer or sell the subject product.

141,144. Attached as Exhibit A is a true and correct copy of an October 15, 2020 invoice from Cisco authorized reseller CDW Direct for a Cisco Catalyst 9200L switch costing \$856.47. The invoice provides a single, flat price for the switch. The invoice does not provide a separate itemized price for the switch’s embedded software. In fact, the invoice contains absolutely no mention of a separate or independent license agreement governing the switch’s embedded software.

1 ~~142.~~145. The sole reference to “software” is buried in the small print of the
2 attempted “Terms and Conditions” located on the back side of the CDW invoice.

3 ~~143.~~146. The attempted “Terms and Conditions” include a “Title; Risk of Loss”
4 section which begins by placing the risk of loss or damage during shipment on the
5 purchaser. It then adds, in small lowercase print, that “title to software will remain with the
6 applicable licensor(s), and Customers rights therein are contained in the license agreement
7 between such licensor(s) and Customer.” Such notice contains no reference to “embedded
8 software.”

9 ~~144.~~147. Cisco does offer several stand alone and independent traditional
10 software licenses, including, without limitation, licenses governing its Digital Network
11 Architecture (“DNA”) network management services. Cisco’s authorized resellers provide
12 separate invoices or line items covering such traditional software licenses. Accordingly, to
13 the extent original purchasers actually read the small print “Terms and Conditions,” such
14 purchasers would have no way of knowing the referenced “software” applied to embedded
15 software as opposed to traditional stand-alone software sold and priced separately.

16 ~~145.~~148. In addition to failing to properly notify original purchasers prior to their
17 purchase that their ability to subsequently transfer or sell the expensive Cisco products is
18 restricted by a purported EULA governing the hardware’s embedded software, at no time
19 does Cisco or its Authorized Resellers obtain the purchasers assent to any purported EULA.

20 ~~146.~~149. At no time has Cisco or its Authorized Resellers placed a notice or
21 warning of a purported EULA on the exterior packaging of any of its hardware. Moreover,
22 such packaging contains no notice or warning advising purchasers that by opening such
23 packaging they would be assenting or agreeing to Cisco’s alleged EULA governing the
24 embedded software. Below are representative photographs of the exterior packaging for a
25 Cisco WS-C2960L switch:

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~~147.~~150.



^{148,151.} Rather than properly notifying original purchasers of the purported EULA governing the embedded software and obtaining their affirmative assent, Cisco has included various attempted notices on the *inside* of the product packaging. Such notices are accessible only *after* the products have been purchased and opened.

^{149,152.} Resellers such as Dexon sell a large volume of new, in the box, never opened Cisco products, meaning at no point were such attempted “notices” ever accessed or viewed by the original purchaser.

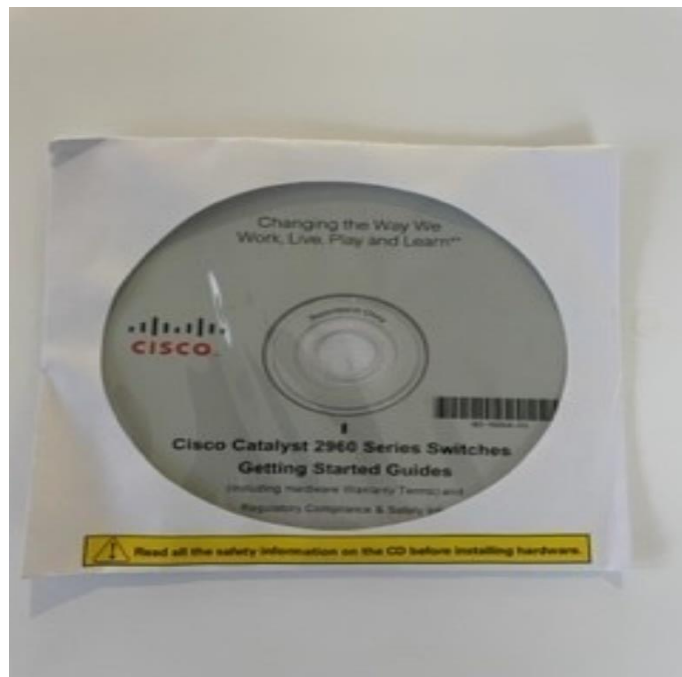
~~150.~~153. Dexon sells such brand-new, in the box, never opened Cisco product to end users like schools, hospitals, and businesses. The individuals opening or accessing such Cisco products are often lower-level information technology personnel charged with installing such equipment. In addition to generally being required to install such equipment in short time frames with little or no opportunity for locating, reviewing and studying any purported EULA governing the embedded software, such IT professionals often have no control over or involvement with purchasing or return decisions.

~~151.~~154. The attempted notices Cisco has included inside the product packaging have varied through the years. For example, an unopened package for a Cisco WS-C2960L switch originally sold on or about 2009 included a separate plastic bag of accessories inside the product packaging. The plastic bag bears a green sticker providing, "Please read the license terms regarding the use of the product included inside this box. By using the product, you agree to be bound by these license terms. If you do not agree with these terms, promptly return the unused product, manual, related equipment and hardware (with proof of payment) to the place of purchase for a full refund":



~~152.~~155.

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6 ~~153.~~156. The referenced licensed terms supposedly to be found “inside this box”
7 are in fact buried in and difficult to access within a “Getting Started Guide” CD included
8 in the plastic bag:



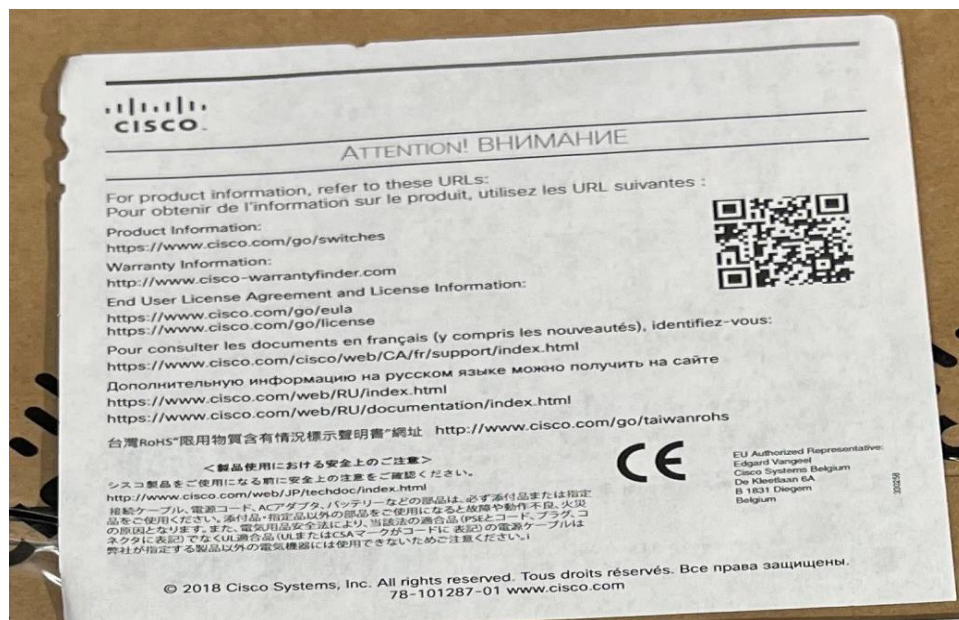
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21
22 ~~154.~~157.



~~155.~~158. The “Getting Started Guide” CD is not required to be utilized or accessed by the IT professional as part of the install process. Rather, as the name implies, it is in fact a “Getting Started Guide” containing instructions. The CD does not contain any software required to be loaded or accessed as part of the installation process and would have been routinely ignored as unnecessary or superfluous by experienced IT professionals.

~~156.~~159. At some unknown time, Cisco stopped including the green sticker or the “Getting Started Guide” CD. In fact, Cisco stopped providing or including *any* copy of the purported EULA governing the embedded software with its products.

~~157.~~160. Rather, Cisco began including a small single page notice directing the user to various websites. Such “product information” notice contains no warning that use of the product constitutes acceptance of Cisco’s purported EULA governing the embedded software or that the consumer’s subsequent use of the product will be restricted. Rather, the notice requires the individual who opened the package, often a lower level IT professional having no responsibility for purchasing or return decisions, to go to a separate URL or website:



~~158.~~161.

1 ~~159.~~162. Subsequent to the introduction of its DNA network management
 2 services, Cisco also began including separate notices governing independent and separate
 3 licenses for such network management services.

4 ~~160.~~163. In addition to failing to provide any proper notice of a purported EULA
 5 governing the embedded software, at no point has Cisco required or obtained any
 6 affirmative assent to such purported EULA by the original purchaser. For example, an
 7 original purchaser who actually goes to the referenced website is not required to
 8 affirmatively accept the purported EULA governing the embedded software via a “click
 9 through” process or otherwise.

10 ~~161.~~164. Moreover, no such affirmative assent to the purported EULA governing
 11 the embedded software is required for the original purchaser to actually use the subject
 12 Cisco products. Without limitation, at no point during the “boot up” process is an end user
 13 advised of any purported EULA governing the embedded software or asked to provide
 14 affirmative assent to any such purported EULA via a “click through” process or otherwise.
 15 Upon information and belief, downstream purchasers and end users first become aware of
 16 Cisco’s contention their use and transfer of the product is restricted by a purported EULA
 17 governing the embedded software via communications from Cisco’s Brand Protection
 18 Team *years after* the original purchase.

19 ~~162.~~165. In light of the absence of any evidence of a valid or enforceable EULA
 20 governing the embedded software, the original transaction involving the subject Cisco
 21 products constitutes a “sale” of both the hardware and associated embedded software. As
 22 a result, Cisco’s form ~~communications and representations that~~advertisements and
 23 publications advising secondary market purchasers’~~ability to use that they are prohibited~~
 24 from using and ~~transfer~~transferring Cisco products are false and misleading and violate the
 25 first sale doctrine codified at 17 U.S.C. § 109. Cisco does not offer or enter into a license
 26 for the subject embedded software and does not control the use of such embedded software.

27 166. In addition to the fact that any purported EULA is not valid or enforceable,
 28 relevant and applicable versions of Cisco’s prior purported “Software License Transfer and

1 Re-licensing Policy” expressly allow the use and transfer of Cisco products by secondary
 2 market purchasers. Cisco’s claimed “Software License Transfer and Relicensing Policy”
 3 applicable to products originally sold during 2012-2017 provides that there is no restriction
 4 on transfer “[i]n situations where the Products combine Hardware and Software and there
 5 is no separate product code or License Fee charged for the Software on the applicable Cisco
 6 then-current published price list at the time of transfer (and therefore a separate License Fee
 7 for the Software cannot be determined). . .” (On information and belief, such “exception”
 8 was included in Cisco’s “Software License Transfer and Relicensing Policy” at least from
 9 2012 to some unknown date in 2017 when such policy was apparently revised. The full
 10 and exact dates such “exception” was included in Cisco’s policy is in Cisco’s possession
 11 and control.) The full relevant provision or “exception” provides:

12
 13
 14 167. On information and belief, Cisco’s “published price list” contained no
 15 separate “Product code or License Fee” for embedded software included with products
 16 governed by Cisco’s purported 2012-2017 “Software License Transfer and Re-licensing
 17 Policy.”

18 168. Cisco’s form advertisements and publications falsely advising secondary
 19 market purchasers that the embedded software is governed by a purported EULA
 20 prohibiting the subsequent transfer and use of Cisco products fails in any way to distinguish
 21 or delineate products governed by versions of Cisco’s “Software License Transfer and Re-
 22 licensing Policy” expressly allowing the transfer and use of such embedded software,
 23 including, without limitation, products sold by Cisco or Cisco authorized resellers to the
 24 original consumers or end users during 2012-2017.

25 169. Dexon has regularly sold, and continues to sell, new, unopened, in the box,
 26 as well as used, Cisco products for, without limitation, model years 2009 to the present.
 27 This has included, and will continue to include, new, unopened, in the box, as well as used,
 28 Cisco products originally sold by Cisco or Cisco authorized resellers to the original

consumers or end users during 2012-2017 and covered by Cisco's purported 2012-2017 "Software License Transfer and Re-licensing Policy."

~~163.~~170. Consumers who purchase Cisco products on the secondary market may use the embedded software included therewith because the title of the product and embedded software is transferred to them. They may also transfer the Cisco products, including the embedded software, freely. They also accept all risk that the product with embedded software may be lost or damaged.

~~164.~~171. When consumers receive the Cisco Brand Protection Team ~~communications~~form advertisements and publications, they falsely believe that they cannot use the product or that the product will not work. There is no license covering the embedded software; rather, any "licenses" apply to add-on "enhanced" software features like DNA. Because there is no license that covers the embedded software, and no assent to any such purported license, Cisco's ~~statements~~form advertisements and publications stating that the embedded software is governed by a purported license which restricts the use and disposition of the Cisco product is false. Downstream consumers, including secondary market purchasers, can use the embedded software without ever buying a separate or independent license from Cisco.

~~165.~~172. When Dexon's customers receive ~~the~~Cisco's form advertisements and publications, including, without limitation, Cisco's form Brand Protection Team ~~letter~~letters, they falsely believe they cannot use the subject Cisco product or that the subject Cisco product will not work because they believe, falsely, that they have to purchase a separate license. They don't.

173. Cisco's form advertisements and publications are particularly egregious because they fail to delineate between products governed by Cisco's current purported EULA and "Software License Transfer and Re-Use Policy" and products governed by prior versions which expressly allow secondary market purchasers to transfer and use Cisco's embedded software.

174. Although a customer purchasing a new, never opened, in the box Cisco product from Dexon is unlikely to ever visit the EULA website identified inside the package, if a customer does, it would be viewing Cisco's current EULA or "Software License Transfer and Re-Use Policy" with the applicable "exception" removed. Customers with product originally sold by Cisco or a Cisco authorized reseller to the original consumers or end users during 2012-2017 are not directed to the applicable earlier versions containing the "exception." Cisco is misleadingly and improperly attempting to change or modify the terms of the purportedly applicable EULA *after* the original transaction.

175. Likewise, Cisco's other false and misleading advertisements and publications referenced above, including Cisco's "relicensing" website, Cisco's "FAQ" for "Third Party Maintenance Services and purchase of Cisco Products outside the Authorized Channel," and Cisco's form "Brand Protection Team" letters, all of which falsely claim secondary market purchaser have no right to transfer or use the embedded software, fail to delineate products governed by Cisco's purported 2012-2017 EULA and "Software License Transfer and Re-licensing Policy" expressly allowing such transfer and use.

176. Cisco's has and will continue to falsely and intentionally misrepresent that secondary market purchasers' use and transfer of embedded software is prohibited despite the fact that: i) the original transaction was a sale of the embedded software and no valid or enforceable software license was created; and ii) the correct applicable purported license expressly allows such transfer and use.

~~166.~~ 177. Cisco's past and ongoing misrepresentations regarding the terms, applicability, scope and interpretation of a purported EULA governing the embedded software and secondary market purchasers' rights to buy, use and transfer secondary-market Cisco products deters consumers from purchasing Cisco products on the secondary market. Dexon has lost and will continue to lose sales of products that would have been made but for Cisco's false representations to consumers regarding the terms, applicability, scope and interpretation of a Cisco's purported EULA and the consumers' ownership rights for Cisco

1 hardware and associated embedded software purchased on the secondary market. These
2 false representations have unjustly enriched Cisco at Dexon's expense.

3 **Cisco's Tortious Interference with Dexon's Business**

4 ~~167.~~178. Because Cisco regards secondary market resellers like Dexon as a
5 threat to its excess profits, Cisco spends substantial money and effort to attack secondary
6 market participants such as Dexon and to chill reseller and end user participation in the
7 secondary market. These steps include but are not limited to employing a team of "Brand
8 Protection" employees whose primary responsibility is to intervene with resellers and end
9 users in cases where they are either contemplating the purchase of product, or have ordered
10 product, from the secondary market.

11 ~~168.~~179. Cisco Brand Protection personnel use a variety of tools to disrupt
12 secondary market sales, including, without limitation, falsely advising Dexon's actual and
13 prospective customers that: i) Dexon does not sell new but rather "used" or "refurbished"
14 Cisco product; ii) Dexon's products are "counterfeit" solely because they were sold on the
15 secondary market despite the fact such products are in fact genuine; iii) Dexon products
16 violate a purported EULA despite the absence of any proper notice of or assent to the
17 purported EULA; ~~and~~ iv) Dexon products violate the purported EULA even though the
18 purported EULA does not even apply to the applicable product; ~~and v) Dexon products~~
19 violate the purported EULA even though the actual governing purported EULA, including,
20 without limitation, Cisco's 2012-2017 purported EULA and "Software License Transfer
21 and Relicensing Policy" expressly allows the use and transfer of embedded software.

22 ~~169.~~180. Cisco has engaged in a pattern and practice of this tortious conduct with
23 the intent to disrupt contracts between Dexon and its customers, pending opportunities with
24 such customers, future business with such customers, and even with the apparent goal of
25 driving Dexon out of business altogether.

1 Fort Bend Independent School District

2 ~~170.~~181. Dexon entered into a contract with Fort Bend Independent School
3 District (“FBISD”) for the sale and purchase of over \$1,300,000.00 in brand new Cisco
4 equipment. On or about June 24, 2019, Cisco representative Dan Roberts falsely advised
5 and represented to FBISD representative Cecile Thompson that the equipment FBISD was
6 purchasing from Dexon could not be new but rather had to “refurbished.”

7 ~~171.~~182. On or about July 9, 2019, Sean O’Brien, a member of Cisco’s Brand
8 Protection Team, sent a letter to FBISD falsely claiming and representing that products sold
9 by Dexon do not come with a “valid software license.” Such letter stated: “According to
10 Cisco Systems’ records (www.cisco.com/go/eula), the Cisco goods listed in Exhibit A are
11 not recorded as being sold to Fort Bend Independent School District through one of Cisco’s
12 authorized resellers. It appears you may have purchased the Cisco goods from a company
13 name Dexon Computer. Unfortunately, Dexon Computer is not a member of the Cisco
14 authorized reseller program. As such, Cisco recommends that you return these goods for a
15 refund, along with any other Cisco products received by the vendor, and replace the items
16 with authorized Cisco products sold via an authorized reseller.”

17 ~~172.~~183. Such letter further warned Dexon’s customer that such products “may
18 not come with a valid software license” and that “Customers purchasing most Cisco goods
19 outside of Cisco’s authorized sales channels *would not automatically have a license to use*
20 *the software.*” (italics added.)

21 ~~173.~~184. As a direct and proximate result of such communications, FBISD
22 falsely believed the Dexon products may not be new and that it would not be able to use
23 such products due to the absence of a “valid software license.” As a direct and proximate
24 result of Cisco’s false and misleading representations, FBISD cancelled its \$1.3 million
25 contract with Dexon, and Dexon has received no further business opportunities from
26 FBISD.

27 ~~174.~~185. Cisco’s representations to FBISD are especially egregious considering
28 the contracted for products were Cisco phones rather than networking equipment containing

1 embedded software which Cisco contends is governed by a purported EULA. Upon
 2 information and belief, unlike Cisco's subject networking equipment, Cisco's phones
 3 utilize "open source" software. The phones do require a completely separate and
 4 independent Cisco service and license to operate (Cisco Unified Communications Manager
 5 which is commonly known as "CallManager"). Thus, Cisco's statement that such products
 6 would lack a "valid software license" were false and misleading.

7 Lockridge Grindal and Nauen

8 ~~175.~~186. Without limitation, on or about March 14, 2019, Tim Casto, a member
 9 of Cisco's Brand Protection Team, sent a letter to Dexon customer Lockridge Grindal and
 10 Nauen ("Lockridge"). Such letter falsely advised Dexon customer Lockridge that "six
 11 switches" purchased from Dexon were "counterfeit." On information and belief, only four
 12 (4) of the six (6) switches are currently alleged to be counterfeit by Cisco.

13 ~~176.~~187. The March 14, 2019 letter warned that "Dexon is NOT a member of
 14 the Cisco Authorized Reseller Program" and that "[r]egardless of what Dexon claims, and
 15 regardless of whether its Cisco product is used or is in new sealed boxes, ANY Cisco
 16 product it supplies is consider unauthorized." Such letter falsely represented that absolutely
 17 no product obtained from Dexon comes with a "valid software license."

18 188. In addition to the fact that the original transaction involving the Lockridge
 19 products was a sale and no valid or enforceable license applicable to the embedded software
 20 was created, on information and belief, all of the Lockridge products were sold by Cisco or
 21 Cisco authorized sellers to the original consumer or end users between 2015-2017.
 22 Accordingly, Cisco's alleged or purported EULA applicable to such products expressly
 23 allowed the embedded software to be transferred and used by secondary market purchasers.

24 ~~177.~~189. As a direct and proximate result of the March 14, 2019 correspondence,
 25 as well as other similar communications from and representations by Cisco's Brand
 26 Protection Team, Lockridge falsely believed all six (6) switches it purchased from Dexon
 27 were counterfeit, that the switches would not work, and that it would not have the required
 28 licenses necessary to use Cisco product purchased from Dexon. Citing the Brand Protection

Team correspondence, Lockridge demanded a refund of all amounts paid to Dexon. Dexon lost all future business opportunities from Lockridge.

Accuray, Inc.

~~178.~~190. Without limitation, on or about , January 27, 2020, Tim Casto, a member of Cisco’s Brand Protection Team, sent an email to Dexon customer Accuray Inc. (“Accuray”). Such email acknowledged that products purchased by Accuray from Dexon had been determined to be authentic or “genuine.” However, the email falsely stated that because such genuine products were purchased on the secondary market, they “did not have a valid software license.” The email stated in relevant part, “Cisco reviewed the console readout and determined that the items are genuine. . .The below items, however, show as sold to end users other than Accuray. This means that the below products do not have a valid software license. . .”

191. In addition to the fact that the original transaction involving the products was a sale and no valid or enforceable license applicable to the embedded software was created, on information and belief, 23 of the 26 subject Accuray products were originally sold by Cisco or Cisco authorized sellers to the original consumers or end users between 2014-2017. Accordingly, Cisco’s alleged or purported EULA applicable to such products expressly allowed the embedded software to be transferred and used by secondary market purchasers.

~~179.~~192. As a direct and proximate result of the January 27, 2020 correspondence, as well as other similar communications from and representations by Cisco’s Brand Protection Team, Accuray falsely believed that the product would not work and that it did not have the required licenses necessary to use the Cisco products purchased from Dexon. As a result, Accuray demanded a refund of all amounts paid to Dexon. Dexon lost all future business opportunities from Accuray.

Meadowridge Networks, Inc.

~~180.~~193. Without limitation, on or about July 12, 2021, Shuting Li, on information and belief a member of Cisco’s Brand Protection Team, sent an email to Dexon

1 customer Meadowridge Networks, Inc. (“Meadowridge”). Such letter falsely implied
 2 product purchased from Dexon was not new or not genuine. The email stated, “Serial
 3 number is verified to be an unauthorized unit. . .because this unit is now in possession of
 4 end customer which is different from the reported end customer. So it is an overseas
 5 diversion unit.”

6 ~~181.~~194. As a direct and proximate result of the July 12, 2021 email, as well as
 7 other similar communications from and representations by Cisco, Meadowridge
 8 understandably understood Cisco to be claiming the products purchased from Dexon to be
 9 “used” and/or counterfeit. In a responsive email, Meadowridge explained, “I am the first
 10 end-user to open the box. . .This came to me in an unopened Cisco box and was not a ‘used’
 11 unit in any sense of the word. . .I had every reason to think that this was a legitimate unit
 12 and no reason to believe that it wasn’t.”

13 ~~182.~~195. Rather than clarify Meadowridge’s interpretation and
 14 misunderstanding of its prior communications, Cisco responded by directing Meadowridge
 15 to a domain or website containing a false and misleading definition of “used.” Namely,
 16 such definition defined “used” as all Cisco products purchased on the secondary market.
 17 (See www.cisco.com/go/relicensing which misleadingly defines “used” products as
 18 “previously owned equipment that is now owned by a party other than the original
 19 customer” including both “opened and unopened equipment.”

20 ~~183.~~196. As a direct and proximate result of the Cisco Brand Protection Team
 21 communications, Meadowridge falsely believed that its use of Cisco products purchased
 22 from Dexon would be impaired or restricted and that the product would not work. As a
 23 direct and proximate result, Meadowridge demanded a refund and was also provided a
 24 replacement or substitute product at a reduced priced. Dexon has lost future business
 25 opportunities from Meadowridge.

26 ~~184.~~197. The foregoing false and misleading representations of fact were
 27 designed to mislead consumers, and have in fact misled consumers, at the expense of
 28 Dexon, causing direct and substantial loss and damage to Dexon.

1 ~~185.~~198. Cisco's false and misleading misrepresentations have caused, and
 2 unless enjoined by this Court, will continue to cause irreparable injury to Dexon.

3 ~~186.~~199. As a direct result of Cisco's tortious interference, Dexon has suffered
 4 significant damages, including the cancellation of numerous pending orders, loss of
 5 opportunity to bid on projects, and the loss of entire relationships with many of its top
 6 customers.

7 **Count I**
 8 **Declaratory Judgment**
 9 **(28 U.S.C. §§ 2201-2202)**

10 ~~187.~~200. Dexon repeats and realleges each of the allegations set forth in the
 11 preceding paragraphs as if fully set forth herein.

12 ~~188.~~201. Dexon seeks a declaration of its rights, pursuant to 28 U.S.C. §§ 2201
 13 & 2202, that the original transactions involving the subject Cisco products is a "sale" of
 14 both the hardware and any associated embedded software and that there exists no valid or
 15 enforceable license agreement governing the embedded software which prohibits the use or
 16 transfer of such products by subsequent secondary market purchasers.

17 ~~189.~~202. Cisco has made, and continues to make false representations to actual
 18 or potential secondary market purchasers, including Dexon's actual or potential customers,
 19 that their ability to use and transfer any secondary market Cisco product is prohibited by a
 20 purported EULA governing the product's embedded software.

21 ~~190.~~203. No such valid or enforceable EULA exists.

22 ~~191.~~204. Rather, the original transaction involving the subject Cisco products
 23 was a "sale" of both the hardware and any included embedded software.

24 205. Even if applicable, which it is not, the certain versions of Cisco's EULA,
 25 including, without limitation Cisco's purported 2012-17 EULA and "Software License
 26 Transfer and Re-licensing Policy" expressly allow the use and transfer of embedded
 27 software by secondary market consumers.

1 ~~192.~~206. Accordingly, Cisco's form communications and representations,
 2 including, without limitation, Cisco's form advertisements and publications which fail to
 3 delineate products governed by Cisco's purported 2012-17 EULA and "Software License
 4 Transfer and Re-licensing Policy" which expressly allows the use and transfer of embedded
 5 software by secondary market consumers, are and continue to be false and have caused and
 6 will continue to cause significant harm and damage to secondary market sellers, including
 7 Dexon.

8 ~~193.~~—A real legal dispute and actual controversy presently exists between the
 9 parties to this action which is concrete and justiciable in character, and as to which each
 10 party possesses an interest in resolving.

11 ~~194.~~207. ~~Dexon has sold and intends to continue selling genuine Cisco products,~~
 12 ~~including new, unopened, in the box Cisco products.~~

13 208. Dexon has in inventory Cisco products sold by Cisco or Cisco authorized
 14 resellers to the original purchasers or end users from at least as early as 2009 to the present.
 15 Because of the nature of the secondary market, Dexon will continue to receive such
 16 products in inventory. Due to the nature of the secondary market, Dexon will continue to
 17 receive more such products in inventory. Dexon has previously sold and will continue to
 18 sell Cisco products sold by Cisco and/or Cisco's authorized resellers to the original
 19 consumers and end users in 2012-2017.

20 ~~195.~~209. Cisco has continued and will continue its longstanding practice of
 21 sending form ~~communications~~advertisements and publications to Dexon's actual and
 22 prospective customers falsely advising such customers that ~~their~~the use and transfer of any
 23 Cisco products purchased from Dexon is prohibited by a purported but invalid and
 24 unenforceable EULA. Cisco's communications have failed and will continue to fail to
 25 distinguish products governed by versions of its purported EULA expressly allowing the
 26 use and transfer of embedded software by secondary market purchases, including products
 27 sold by Cisco or Cisco's authorized resellers to the original purchasers or end users during
 28

1 2012-2017 and governed by Cisco’s purported 2012-2017 EULA and “Software License
 2 Transfer and Re-licensing Policy.”

3 ~~196.210.~~ Unless and until Cisco’s form communications and representations are
 4 deemed to be false ~~and~~, in violation of the first sale doctrine codified at 17 U.S.C. §109, or
 5 contrary to Cisco’s own purported 2012-17 EULA and “Software License Transfer and Re-
 6 licensing Policy” which expressly allows the use and transfer of embedded software by
 7 secondary market consumers, Dexon’s ability to sell such products will be wrongfully and
 8 unnecessarily impaired and Dexon will continue to be injured and damaged thereby.
 9 Accordingly, Dexon seeks declaratory relief from this Court.

10 ~~197.211.~~ The controversy between Dexon and Cisco warrants relief declaring the
 11 rights of the parties pursuant to 28 U.S.C. §§ 2201 & 2202, and finding that: i) original
 12 purchasers of Cisco products obtained the products and any associated embedded software
 13 via a “sale”; ii) there is no valid or enforceable EULA governing the embedded software in
 14 Cisco products sold by Dexon on the secondary market; ~~and iii~~ iii) even if applicable, valid
 15 and enforceable, which it is not, Cisco’s purported 2012-17 EULA and “Software License
 16 Transfer and Relicensing Policy” expressly allows the use and transfer of embedded
 17 software by secondary market consumers; and iv) Dexon’s customers’ are free to use and
 18 transfer such products pursuant to the first sale doctrine codified at 17 U.S.C. §109.

19 **Count II**
 20 **Lanham Act False Advertising**

21 ~~198.212.~~ Dexon repeats and realleges each of the allegations set forth in the
 22 preceding paragraphs as if fully set forth herein.

23 ~~199.213.~~ Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), provides that it
 24 is unlawful for any person to use a “false or misleading description of fact, or false or
 25 misleading representation of fact, which . . . in commercial advertising or promotion,
 26 misrepresents the nature, characteristics, qualities, or geographic origin of his or her or
 27 another person’s goods, services, or commercial activities.”

1 ~~200.~~214. As set forth above, Cisco has published in commercial advertising and
 2 promotion, and continues to publish in commercial advertising and promotion, false or
 3 misleading representations of fact regarding the software embedded in Cisco hardware sold
 4 on the secondary market.

5 ~~201.~~215. In addition, Cisco has published in commercial advertising and
 6 promotion, and continues to publish in commercial advertising and promotion, false or
 7 misleading representations of fact regarding whether products in the secondary market are
 8 “used.”

9 ~~202.~~216. Cisco knowingly tells end users that they cannot use the products with
 10 embedded software because they need to purchase a separate license.

11 ~~203.~~217. Cisco’s statements to end users that the embedded software is subject
 12 to a software license like the EULA are false. End users cannot be bound by a contract that
 13 does not exist in the first place and are free to use and transfer the subject products pursuant
 14 to the first sale doctrine.

15 218. Cisco knowingly tells end users that they cannot use the products with
 16 embedded software despite the fact that versions of Cisco’s purported EULA, including,
 17 without limitation, Cisco’s purported 2012-17 EULA and “Software License Transfer and
 18 Re-license Policy” applicable to products Dexon has sold and will continue to sell,
 19 expressly allow the use and transfer of such embedded software.

20 ~~204.~~219. The foregoing false and misleading representations of fact were
 21 designed to mislead consumers by making them falsely believe they could not use the
 22 product or that the product would not work, and have in fact misled consumers, at the
 23 expense of Dexon, causing direct and substantial loss and damage to Dexon.

24 ~~205.~~220. The foregoing false and misleading representations of fact are made
 25 willfully and entitle Dexon to recover the profits obtained by Cisco thereby, in addition to
 26 Dexon’s own damages suffered as a result of Cisco’s false and misleading representations
 27 of fact.

1 ~~206.~~221. Cisco's misrepresentations have caused, and unless enjoined by this
2 Court, will continue to cause irreparable injury to Dexon.

3 ~~207.~~222. Dexon will continue to suffer irreparable harm to its goodwill if these
4 actions continue and Dexon is entitled to injunctive relief to preclude such conduct

5 **Count III**
6 **Intentional Interference with Contractual Relations**

7 ~~208.~~223. Dexon repeats and realleges each of the allegations set forth in the
8 preceding paragraphs as if fully set forth herein.

9 ~~209.~~224. Dexon secured contracts with certain customers, including, without
10 limitation, Fort Bend Independent School District, Lockridge, Meadowridge and Accuray
11 for the sale of Cisco products on which Dexon would have earned significant profits.

12 ~~210.~~225. On information and belief, Cisco knew or should have known of these
13 contractual relationships between Dexon and these third party customers.

14 ~~211.~~226. ~~On information and belief~~ As detailed herein, Cisco intentionally, or
15 with reckless disregard for the truth, made false and misleading statements about Dexon
16 and the products it sells to these customers in order to disrupt the contractual relationship
17 and to cause these customers to purchase product from Cisco authorized resellers at a higher
18 price. Without limitation, Cisco falsely advised such customers they did not possess a valid
19 license to use embedded software included with the subject products. With respect to
20 Lockridge and Accuray, Cisco made such false and misleading statements despite knowing
21 its purported 2012-17 EULA and "Software License Transfer and Re-license Policy"
22 applicable to the subject products expressly allow the use and transfer of such embedded
23 software.

24 ~~212.~~227. Cisco's statements in fact disrupted these contractual relationships
25 between Dexon and its customers.

26 ~~213.~~228. Dexon has suffered substantial economic damage as a result of this
27 wrongful conduct in an amount subject to proof at trial.

1 ~~214.~~229. Cisco's actions have caused, and unless enjoined by this Court, will
2 continue to cause irreparable injury to Dexon.

3 **Count IV**
4 **Intentional Interference with Prospective Economic Advantage**

5 ~~215.~~230. Dexon repeats and realleges each of the allegations set forth in the
6 preceding paragraphs as if fully set forth herein.

7 ~~216.~~231. An economic relationship existed between Dexon and its actual and
8 prospective customers, including, without limitation, Fort Bend Independent School
9 District, Lockridge, Meadowridge, and Accuray, each of which contained the probability
10 of substantial future economic benefits to Dexon.

11 ~~217.~~232. On information and belief, Cisco knew or should have known of these
12 relationships.

13 ~~218.~~233. ~~On information and belief~~As detailed herein, Cisco intentionally, or
14 with reckless disregard, engaged in tortious conduct designed to disrupt Dexon's potential
15 benefit from these relationships.

16 234. Without limitation, Cisco falsely advised such customers they did not or
17 would not possess a valid license for embedded software included with any products
18 purchased from Dexon. Cisco made such false and misleading statements despite knowing:
19 i) Dexon has sold and will continue to sell products governed by Cisco's purported 2012-
20 17 EULA and "Software License Transfer and Re-license Policy"; and ii) Cisco's
21 purported 2012-17 EULA and "Software License Transfer and Re-license Policy" expressly
22 allow the use and transfer of such embedded software.

23 ~~219.~~235. Cisco's statements were made with the intent to disrupt the economic
24 relationship between Dexon and its potential and actual customers in order to damage
25 Dexon and or divert business to "Cisco Authorized Resellers" under Cisco's control.

26 ~~220.~~236. Cisco's knew such statements were false and misleading or had a
27 disregard for whether such statements were true of false and misleading.

1 ~~224.~~237. As a result of the efforts detailed above, Dexon's relationships with its
 2 potential and actual customers have in fact been permanently disrupted and/or materially
 3 damaged in a significant number of instances, including its future relationships. As a result
 4 of Cisco's tortious efforts, Dexon's customers have refused to pay for certain Cisco goods,
 5 have returned and/or cancelled orders for such goods, have removed Dexon's bids from
 6 contention for business, and have ceased doing business with Dexon on other products
 7 and/or altogether.

8 ~~222.~~238. Dexon has suffered substantial economic damage as a result of this
 9 wrongful conduct in an amount subject to proof at trial.

10 ~~223.~~239. Cisco's actions have caused, and unless enjoined by this Court, will
 11 continue to cause irreparable injury to Dexon.

12 **Count V**
 13 **Trade Libel**

14 ~~224.~~240. Dexon repeats and realleges each of the allegations set forth in the
 15 preceding paragraphs as if fully set forth herein.

16 241. On information and belief, Dexon alleges that Cisco has repeatedly made
 17 disparaging and false statements about Dexon's products as detailed herein, including,
 18 without limitation, the statements and representations detailed above to Dexon customers
 19 Fort Bend Independent School District, Lockridge, Meadowridge and Accuray. As detailed
 20 herein, such false and disparaging statements included, without limitation: i) falsely
 21 claiming all the products sold by Dexon to Lockridge were counterfeit; ii) falsely claiming
 22 the products Dexon had contracted to sell to FBISD were "refurbished" rather than new;
 23 and iii) that such Dexon customers did not possess or would not possess a valid license for
 24 embedded software included with any products purchased from Dexon.

25 ~~225.~~242. Cisco made such disparaging and false statements despite knowing: i)
 26 Dexon has sold and will continue to sell products governed by Cisco's purported 2012-17
 27 EULA and "Software License Transfer and Re-license Policy"; and ii) Cisco's purported

2012-17 EULA and “Software License Transfer and Re-license Policy” expressly allow the use and transfer of such embedded software.

226,243. Cisco’s statements disparaged Dexon’s products. On information and belief, Dexon alleges that the claims made were false or materially misleading.

227,244. Cisco intentionally made such statement knowing such statements were false and misleading or having a complete disregard for whether such statements were true or false and misleading.

228,245. Dexon has suffered and will continue to suffer irreparable harm should Cisco’s trade libel be allowed to continue.

229,246. As a proximate result of Cisco’s statements, the identified actual customers have been deterred from buying Dexon’s products and from otherwise dealing with Dexon. Specifically, such customers have refused to pay for certain Cisco goods, have returned and/or cancelled orders for such goods, have removed Dexon’s bids from contention for business, and have ceased doing business with Dexon on other products altogether.

230,247. Dexon has suffered substantial economic damage as a result of this wrongful conduct in an amount subject to proof at trial.

Count VI **Trade Libel Per Se**

231,248. Dexon repeats and realleges each of the allegations set forth in the preceding paragraphs as if fully set forth herein.

232,249. As detailed herein, Cisco has repeatedly made disparaging and false statements about Dexon’s products to Dexon customers Fort Bend Independent School District, Lockridge, Meadowridge and Accuray.

250. As detailed herein, such false and disparaging statements included, without limitation: i) falsely claiming all the products sold by Dexon to Lockridge were counterfeit; ii) falsely claiming the products Dexon had contracted to sell to FBISD were “refurbished”

1 rather than new; and iii) that such Dexon customers did not possess or would not possess a
 2 valid license for embedded software included with any products purchased from Dexon.

3 251. Cisco made such disparaging and false statements despite knowing: i) Dexon
 4 has sold and will continue to sell products governed by Cisco's purported 2012-17 EULA
 5 and "Software License Transfer and Relicense Policy"; and ii) Cisco's purported 2012-17
 6 EULA and "Software License Transfer and Re-license Policy" expressly allow the use and
 7 transfer of such embedded software.

8 ~~233.~~252. Cisco's statements disparaged Dexon's products.

9 ~~234.~~253. Cisco intentionally made such statements knowing such statements
 10 were false and misleading or having a complete disregard for whether such statements were
 11 true or false and misleading.

12 ~~235.~~254. As a proximate result of Cisco's statements, the identified actual
 13 customers have been deterred from buying Dexon's products and from otherwise dealing
 14 with Dexon. Specifically, such customers have refused to pay for certain Cisco goods, have
 15 returned and/or cancelled orders for such goods, have removed Dexon's bids from
 16 contention for business, and have ceased doing business with Dexon on other products
 17 altogether.

18 ~~236.~~255. Dexon has suffered substantial economic damage as a result of this
 19 wrongful conduct in an amount subject to proof at trial.

20 ~~237.~~256. Such false and misleading statements by Cisco go to the integrity and
 21 character of Dexon's business practices, including, without limitation, implying that Dexon
 22 misleads its customers as to the nature or quality of its goods, including that Dexon sells
 23 "refurbished" products as "new," and that Dexon misrepresents that its secondary market
 24 customers will be able to use and transfer Cisco products purchased from Dexon. As a
 25 result, damage is presumed for such statements irrespective of any actual damages proven
 26 by Dexon at trial.

27 **THIRD PARTY CLAIMS**

1 ~~238.~~257. Third Party Plaintiff Dexon Computer, Inc. asserts the following claims
 2 against Third Party Defendants Atlantix Global Systems International, LLC, Bizcom
 3 Electronics, Inc., Digi Devices Online, Enterprise Business Technologies, Inc., Fiber Cable
 4 Connections, MJSI, Multimode Technologies, LLC, Optimum Data, Inc., Paragon, Pure
 5 Future Technology, Inc., Seastar IT Trading LLC, Server Tech Supply, Softnetworks, Inc.,
 6 Strada Networks, LLC, Unlimited Network Solutions and Wisecom Technologies alleges
 7 as follows:

8 THE PARTIES

9 ~~239.~~258. Third Party Plaintiff Dexon Computer, Inc. (“Dexon”) is a Minnesota
 10 corporation with its principal place of business at 9201 E. Bloomington Freeway, Suite BB,
 11 Bloomington, Minnesota 55420.

12 ~~240.~~259. On information and belief, Third Party Defendant Atlantix Global
 13 Systems International, LLC is a Georgia limited liability corporation with its principal place
 14 of business in Georgia.

15 ~~241.~~260. On information and belief, Third Party Defendant Bizcom Electronics,
 16 Inc., is a California corporation with its principal place of business in California.

17 ~~242.~~261. On information and belief, Third Party Defendant Digi Devices Online
 18 is a foreign corporation with its principal U.S. place of business in Texas.

19 ~~243.~~262. On information and belief, Third Party Defendant Enterprise Business
 20 Technologies, Inc. is a New York corporation with its principal place of business in New
 21 York.

22 ~~244.~~263. On information and belief, Third Party Defendant Fiber Cable
 23 Connections is a Washington corporation with its principal place of business in
 24 Washington.

25 ~~245.~~264. On information and belief, Third Party Defendant MJSI is a California
 26 corporation with its principal place of business in California.

1 ~~246.~~265. On information and belief, Third Party Defendant Multimode
2 Technologies, LLC is a Minnesota limited liability company with its principal place of
3 business in Minnesota.

4 ~~247.~~266. On information and belief, Third Party Defendant Optimum Data, Inc.
5 is a Nebraska corporation with its principal place of business in Nebraska.

6 ~~248.~~267. On information and belief, Third Party Defendant Paragon is a
7 Massachusetts corporation with its principal place of business in Massachusetts.

8 ~~249.~~268. On information and belief, Third Party Defendant Pure Future
9 Technology, Inc. is a California corporation with its principal place of business in
10 California.

11 ~~250.~~269. On information and belief, Third Party Defendant Seastar IT Trading
12 LLC is a Washington limited liability company with its principal place of business in
13 Washington.

14 ~~251.~~270. On information and belief, Third Party Defendant Server Tech Supply
15 is a Virginia corporation with its principal place of business in Pennsylvania.

16 ~~252.~~271. On information and belief, Third Party Defendant Softnetworks, Inc. is
17 a New Jersey limited liability company with its principal place of business in New Jersey.

18 ~~253.~~272. On information and belief, Third Party Defendant Strada Networks,
19 LLC is a foreign limited liability company with its principal place of business in British
20 Columbia, Canada.

21 ~~254.~~273. On information and belief, Third Party Defendant Teksavers is a Texas
22 corporation with its principal place of business in Texas

23 ~~255.~~274. On information and belief, Third Party Defendant Unlimited Network
24 Solutions is a corporation with its principal place of business in California.

25 ~~256.~~275. On information and belief, Wisecom Technologies is a corporation
26 with its principal place of business in Maryland.

27 **Supply of Alleged Counterfeit and Infringing Product**

1 ~~257.~~276. The Third Party Defendants are all reputable dealers and merchants
2 with respect to the Cisco products alleged to be counterfeit and thereby infringing herein
3 (“allegedly infringing Cisco product”).

4 ~~258.~~277. Dexon obtained such allegedly infringing Cisco product from the Third
5 Party Defendants. While Dexon denies Cisco’s allegations and believes the subject products
6 to be genuine, Dexon relied in good faith on the Third Party Defendants in procuring or
7 obtaining such products.

8 ~~259.~~ Without limitation, the Third Party Defendants warranted that such products
9 sold to Dexon would be “delivered free of the rightful claim of any third person by way of
10 infringement or the like.” *See* U.C.C. §2-312(3).

FIRST THIRD PARTY CLAIM
(Indemnification - All Third Party Defendants)

~~260.~~279. Dexon repeats and realleges each of the allegations set forth in the preceding paragraphs as if fully set forth herein.

~~261.~~280. Dexon was named in this litigation as a direct result of product procured from and/or supplied by the Third Party Defendants.

~~262.~~281. Third Party Defendants should be ordered to indemnify Dexon whether based on express agreement, implied agreement or common law.

SECOND THIRD PARTY CLAIM
(Contribution - All Third Party Defendants)

~~263.~~282. Dexon repeats and realleges each of the allegations set forth in the preceding paragraphs as if fully set forth herein.

~~264.~~283. Dexon was named in this litigation as a direct result of product procured from and supplied by the Third Party Defendants.

~~265.~~284. Dexon is entitled to contribution from Third Party Defendants, whether based on express agreement, implied agreement or common law, to pay or defray any judgment entered against Dexon herein.

PRAYER FOR RELIEF

WHEREFORE, Defendant, Counterclaim Plaintiff and Third Party Plaintiff Dexon Computer, Inc. prays for judgment and relief against Plaintiffs and Counterclaim Defendants Cisco Systems, Inc. and Cisco Technology, Inc. (“Cisco”) and Third Party Defendants Atlantix Global Systems International, LLC, Bizcom Electronics, Inc., Digi Devices Online, Enterprise Business Technologies, Inc., Fiber Cable Connections, MJSI, Multimode Technologies, LLC, Optimum Data, Inc., Paragon, Pure Future Technology, Inc., Seastar IT Trading LLC, Server Tech Supply, Softnetworks, Inc., Strada Networks, LLC, Unlimited Network Solutions and Wisecom Technologies as follows:

- 1 a. Dismissing Plaintiffs’ Cisco Systems, Inc. and Cisco Technology, Inc.
- 2 claims with prejudice, together with costs and disbursements;
- 3 b. Awarding Dexon actual damages, subject to proof at trial but in an
- 4 amount in excess of \$75,000.;
- 5 c. For equitable remedial efforts by Counterclaim Defendants sufficient
- 6 to rehabilitate Dexon’s damaged reputation;
- 7 d. Declaring that: i) original purchasers of Cisco products obtained the
- 8 products and any associated embedded software via a “sale”; ii) there is no valid or
- 9 enforceable EULA governing the embedded software in Cisco products sold by Dexon on
- 10 the secondary market; and iii) Dexon’s customers’ are free to use and transfer such products
- 11 pursuant to the first sale doctrine codified at 17 U.S.C. §109.
- 12 e. For orders restraining or enjoining Cisco from engaging in similar
- 13 conduct in the future;
- 14 f. Awarding Dexon its costs and expenses of litigation, including
- 15 reasonable attorneys’ fees;
- 16 g. An award in Dexon’s favor against Third Party Defendants sufficient
- 17 to compensate Dexon for all economic loss, damages, attorney's fees and costs resulting
- 18 from the claims herein; and
- 19 h. Such other and further relief as this Court deems just and equitable.

1 Dated: ~~April 6~~ May, 2022

/s/ Amanda R. Washton

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DEMAND FOR JURY TRIAL

Dexon Computer, Inc. demands a trial by jury on all issues so triable.

Dated: ~~April 6~~ May, 2022

/s/ Amanda R. Washton

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

CISCO SYSTEMS, INC., a Delaware
corporation and CISCO TECHNOLOGY,
INC., a California corporation,

Plaintiffs,

v.

DEXON COMPUTER, INC., a Minnesota
corporation,

Defendant.

DEXON COMPUTER, INC., a Minnesota
corporation,

Counterclaim Plaintiff and
Defendant,

v.

Case No. 3:20-CV-4926-CRB

**DEFENDANT'S [PROPOSED] FOURTH
AMENDED ANSWER, AFFIRMATIVE
DEFENSES, COUNTERCLAIMS AND
THIRD-PARTY CLAIMS**

Hon. Charles R. Breyer
Presiding Judge

Trial Date: None

CISCO SYSTEMS, INC., a Delaware
corporation and CISCO TECHNOLOGY,
INC., a California corporation,

Counterclaim Defendants
and Plaintiffs.

DEXON COMPUTER, INC., a Minnesota
corporation,

Third-Party Plaintiff,

v.

ATLANTIX GLOBAL SYSTEMS
INTERNATIONAL, LLC, BIZCOM
ELECTRONICS, INC., DIGI DEVICES
ONLINE, ENTERPRISE BUSINESS
TECHNOLOGIES, INC., FIBER CABLE
CONNECTIONS, MJSI, MULTIMODE
TECHNOLOGIES, LLC, OPTIMUM
DATA, INC., PARAGON, PURE
FUTURE TECHNOLOGY, INC.,
SEASTAR IT TRADING LLC, SERVER
TECH SUPPLY, SOFTNETWORKS,
INC., STRADA NETWORKS, LLC,
TEKSAVERS, UNLIMITED NETWORK
SOLUTIONS, and WISECOM
TECHNOLOGIES,

Third-Party Defendants,

Defendant Dexon Computer, Inc. (“Dexon”), by and through its undersigned counsel, for its Answer, denies each and every allegation in Plaintiffs Cisco Systems, Inc. and Cisco Technology Inc.’s (“Plaintiffs”) First Amended Complaint (“Complaint”) except as expressly admitted, qualified or otherwise responded to herein and denies that Plaintiffs are entitled to any of the relief requested in their Prayer for Relief. In response to each of the numbered paragraphs of the Complaint, Dexon states as follows. To the extent the headings or any other non-numbered statements in the Complaint contain allegations, Dexon denies each and every such allegation.

INTRODUCTION

1. Dexon denies the allegations of paragraph 1 of the Complaint.

2. Dexon denies the allegations of paragraph 2 of the Complaint.

THE PARTIES

3. Dexon lacks sufficient information to admit or deny the allegations of paragraph 3 of the Complaint, and on that basis Dexon denies those allegations.

4. Dexon admits the allegations of paragraph 4 of the Complaint.

5. Dexon denies the allegations of paragraph 5 of the Complaint.

JURISDICTION AND VENUE

6. Dexon admits that the Complaint purports to be one “founded upon violations of Federal trademark laws” but denies any such purported claims have legal or factual merit. The remaining allegations in paragraph 6 of the Complaint are legal conclusions and questions of law regarding jurisdiction to which no response is required. To the extent a response is required, Dexon denies such allegations.

7. Dexon denies the allegations of paragraph 7 of the Complaint.

8. Dexon denies the allegations of paragraph 8 of the Complaint.

9. Dexon denies the allegations of paragraph 9 of the Complaint.

10. Dexon denies the allegations of paragraph 10 of the Complaint.

11. Dexon denies the allegations of paragraph 11 of the Complaint.

FACTUAL ALLEGATIONS

Alleged Cisco Business and History

12. Dexon lacks sufficient information to admit or deny the allegations of paragraph 12 of the Complaint, and on that basis Dexon denies those allegations.

13. Dexon lacks sufficient information to admit or deny the allegations of paragraph 13 of the Complaint, and on that basis Dexon denies those allegations.

14. Dexon lacks sufficient information to admit or deny the allegations of paragraph 14 of the Complaint, and on that basis Dexon denies those allegations.

Alleged Cisco Trademarks

15. Dexon lacks sufficient information to admit or deny the allegations of paragraph 15 of the Complaint, and on that basis Dexon denies those allegations.

16. Dexon lacks sufficient information to admit or deny the allegations of paragraph 16 of the Complaint, and on that basis Dexon denies those allegations.

17. Dexon lacks sufficient information to admit or deny the allegations of paragraph 17 of the Complaint, and on that basis Dexon denies those allegations.

18. Dexon lacks sufficient information to admit or deny the allegations of paragraph 18 of the Complaint, and on that basis Dexon denies those allegations.

Alleged Counterfeit “Cisco” Products

19. Dexon lacks sufficient information to admit or deny the allegations of paragraph 19 of the Complaint, and on that basis Dexon denies those allegations.

20. Dexon lacks sufficient information to admit or deny the allegations of paragraph 20 of the Complaint, and on that basis Dexon denies those allegations.

Alleged Impact on Health, Safety, and National Security Caused by Counterfeit Cisco Products

21. Dexon lacks sufficient information to admit or deny the allegations of paragraph 21 of the Complaint, and on that basis Dexon denies those allegations.

22. Dexon lacks sufficient information to admit or deny the allegations of paragraph 22 of the Complaint, and on that basis Dexon denies those allegations.

Dexon's Alleged History and Practice of Trafficking in Counterfeit Cisco Products

23. Dexon admits selling product bearing the Cisco name and/or mark, but denies the remaining allegations of paragraph 23 of the Complaint, including, without limitation, any allegation such product was counterfeit.

24. Dexon denies the allegations of paragraph 24 of the Complaint.

25. Dexon denies the allegations of paragraph 25 of the Complaint.

Alleged Activity Prior to 2015 Purportedly Demonstrating Dexon's Pattern and Practice of Knowingly Trafficking in Counterfeit Cisco Products

Alleged July 27, 2006 Sale of Counterfeit Cisco Products to a Cisco Investigator (Reston, Virginia)

26. Dexon denies the allegations in paragraph 26 of the Complaint. Plaintiffs previously commenced a lawsuit against Dexon in 2011 including claims based directly on such allegations which were resolved via a confidential settlement agreement and dismissed with prejudice.

FBI's Seizure of Alleged Counterfeit Cisco Products from Dexon on February 26, 2008

27. Dexon admits the Federal Bureau of Investigation ("FBI") executed a search warrant at Dexon's business location on or about February 26, 2008, but denies the remaining allegations in paragraph 27 of the Complaint including, without limitation, any allegation, suggestion or implication any or "all" of the product taken by the FBI was determined to be counterfeit. Plaintiffs previously commenced a lawsuit against Dexon in 2011 including claims based directly on such allegations which were resolved via a confidential settlement agreement and dismissed with prejudice.

Cisco's March 2008 Cease and Desist Letter to Dexon and its CEO

28. Dexon admits Plaintiffs sent a letter addressed to Dexon's President and CEO Steve O'Neil on or about March 7, 2008, and that Dexon responded via a letter from its counsel on or about March 18, 2008, but Dexon denies the reminder of the allegations in paragraph 28 of the Complaint, including, without limitation, Plaintiffs' attempted

1 characterizations of the letters or communications which speak for themselves. Plaintiffs
 2 previously commenced a lawsuit against Dexon in 2011 including claims based directly on
 3 such allegations which were resolved via a confidential settlement agreement and dismissed
 4 with prejudice.

5 **Dexon's June 2010 Sale of Alleged Counterfeit Cisco Products to Wayne**
 6 **State University (Detroit, Michigan) and Cisco's C&D Letter**

7 29. Dexon admits selling and shipping Cisco product to Wayne State University
 8 on or about February 21, 2010 but denies the remainder of the allegations in paragraph 29
 9 of the Complaint, including, without limitation, any allegation the product involved was
 10 counterfeit. Plaintiffs previously commenced a lawsuit against Dexon in 2011 including
 11 claims based directly on such allegations which were resolved via a confidential settlement
 12 agreement and dismissed with prejudice.

13 30. Dexon admits Plaintiffs sent a letter addressed to Dexon's President and CEO
 14 Steve O'Neil on or about August 6, 2010 concerning Dexon's sale of Cisco product to
 15 Wayne State University, but Dexon denies the reminder of the allegations in paragraph 30
 16 of the Complaint, including, without limitation, Plaintiffs' attempted characterization of the
 17 letter which speaks for itself. Plaintiffs previously commenced a lawsuit against Dexon in
 18 2011 including claims based directly on such allegations which were resolved via a
 19 confidential settlement agreement and dismissed with prejudice.

20 31. Dexon admits it responded via a letter from counsel to Plaintiffs' Wayne State
 21 University allegations on or about August 23, 2010, but Dexon denies the reminder of the
 22 allegations in paragraph 31 of the Complaint, including, without limitation, Plaintiffs'
 23 attempted characterization of the letter which speaks for itself. Plaintiffs previously
 24 commenced a lawsuit against Dexon in 2011 including claims based directly on such
 25 allegations which were resolved via a confidential settlement agreement and dismissed with
 26 prejudice.

27 32. Dexon admits Plaintiffs sent a follow-up letter concerning or relating to the
 28 Wayne State University allegations on or about August 30, 2010, but Dexon denies the

1 reminder of the allegations in paragraph 32 of the Complaint, including, without limitation,
 2 Plaintiffs' attempted characterization of the letter which speaks for itself. Plaintiffs
 3 previously commenced a lawsuit against Dexon in 2011 including claims based directly on
 4 such allegations which were resolved via a confidential settlement agreement and dismissed
 5 with prejudice.

6 **Dexon's July 2010 Sale of Alleged Counterfeit Cisco Products to a Cisco**
 7 **Investigator (Los Angeles, California)**

8 33. Dexon denies the allegations in paragraph 33 of the Complaint. Plaintiffs
 9 previously commenced a lawsuit against Dexon in 2011 including claims based directly on
 10 such allegations which were resolved via a confidential settlement agreement and dismissed
 11 with prejudice.

12 **Dexon's Alleged Illegal Conduct Giving Rise to the Present Lawsuit**

13 34. Dexon denies the allegations in paragraph 34 of the Complaint.

14 **Dexon's July 2015 Sale of Alleged Counterfeit Cisco Product to Things**
 15 **Remembered, Inc. (Highland Heights, Ohio) and Cisco's C&D Letter**

16 35. Dexon admits selling Cisco product to Things Remembered, Inc. on or about
 17 July 2015, but denies the remainder of the allegations in paragraph 35 of the Complaint,
 18 including any allegation the product was counterfeit.

19 36. Dexon admits Plaintiffs sent a letter addressed to Dexon's counsel relating to
 20 the Things Remembered, Inc. allegations on or about August 27, 2020 and that Dexon
 21 responded thereto, but Dexon denies the reminder of the allegations in paragraph 36 of the
 22 Complaint, including, without limitation, Plaintiffs' attempted characterizations of the
 23 letters or communications which speak for themselves.

24 **Dexon's December 2016 Sale of Alleged Counterfeit Cisco Products to**
 25 **Jack Henry & Associates, Inc. (Monett, Missouri) and Cisco's C&D**
 26 **Letter**

27 37. Dexon admits selling Cisco product to Jack Henry & Associates, Inc. ("Jack
 28 Henry") on or about December 2016, but denies the remainder of the allegations in

1 paragraph 37 of the Complaint, including, without limitation, any allegation the product
2 was counterfeit.

3 38. Dexon admits Plaintiffs sent a letter addressed to Dexon's counsel relating to
4 the Jack Henry allegations, but Dexon denies the reminder of the allegations in paragraph
5 38 of the Complaint, including, without limitation, Plaintiffs' attempted characterization of
6 the letter which speaks for itself.

7 39. Dexon admits it responded to Plaintiffs' Jack Henry allegations via a letter
8 from Dexon's counsel, but denies the reminder of the allegations in paragraph 39 of the
9 Complaint, including, without limitation, Plaintiffs' attempted characterizations of the
10 responsive letter which speaks for itself.

11 **Dexon's October 2017 Sale of Alleged Counterfeit Cisco Products to a**
12 **Cisco Investigator (Berkeley, California)**

13 40. Dexon denies the allegations in paragraph 40 of the Complaint.

14 **Dexon's January 2018 Sale of Alleged Counterfeit Cisco Product to**
15 **Community Health Alliance (Reno, Nevada) and Cisco's C&D Letter**

16 41. Dexon admits selling Cisco product to Community Health Alliance ("CHA")
17 on or about January 2018, but denies the remainder of the allegations in paragraph 41 of
18 the Complaint, including, without limitation, any allegation the product was counterfeit.

19 42. Dexon admits Plaintiffs and Dexon's counsel exchanged a series of letters or
20 communications relating to the CHA allegations, but denies the remainder of the allegations
21 in paragraph 42 of the Complaint, including, without limitation, Plaintiffs' attempted
22 characterizations of the letters or communications which speak for themselves.

23 **Dexon's April 2018 Sale of Alleged Counterfeit Cisco Products to**
24 **Tucson Medical Center (Arizona)**

25 43. Dexon admits selling Cisco product to Tucson Medical Center ("TMC") on
26 or about April 2018, but denies the remainder of the allegations in paragraph 43 of the
27 Complaint, including, without limitation, any allegation the product was counterfeit.

Dexon's April 2018 Sale of Alleged Counterfeit Cisco Products to DARCARS (Maryland) and Cisco's C&D Letter

44. Dexon admits selling Cisco product to DARCARS on or about April 2018, but denies the remainder of the allegations in paragraph 44 of the Complaint, including, without limitation, any allegation the product was counterfeit.

45. Dexon admits Plaintiffs sent a letter addressed to Dexon's counsel relating to the DARCARS allegations, but Dexon denies the reminder of the allegations in paragraph 45 of the Complaint, including, without limitation, Plaintiffs' attempted characterization of the letter which speaks for itself.

Dexon's August 2018 Sale of Alleged Counterfeit Cisco Products to Lockridge, Grindal, Nauen, PLLP (Minneapolis, Minnesota)

46. Dexon admits selling Cisco product to Lockridge, Grindal, Nauen, PLLP on or about August 2018, but denies the remainder of the allegations in paragraph 46 of the Complaint, including, without limitation, any allegation the product was counterfeit.

Dexon's August 2018 Sale of Alleged Counterfeit Cisco Products to Regional Justice Information Service (St. Louis, MO) and Cisco's C&D Letter

47. Dexon admits selling Cisco product to Regional Justice Information Service ("RJIS") on or about August 2018, but denies the remainder of the allegations in paragraph 47 of the Complaint, including, without limitation, any allegation the product was counterfeit.

48. Dexon admits Plaintiffs sent a letter addressed to Dexon's counsel relating to the RJIS allegations, but Dexon denies the reminder of the allegations in paragraph 48 of the Complaint, including, without limitation, Plaintiffs' attempted characterization of the letter which speaks for itself.

Dexon's Purchases in 2018 of Alleged Counterfeit Switches from PureFutureTech (Fremont, California)

49. Dexon admits purchasing Cisco product from PureFutureTech on or about 2018 and that the purported supplier of such product was HongKong Sells, a former

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1 authorized licensed seller of Cisco products, but lacks sufficient information to admit or
 2 deny the remaining allegations of paragraph 49 of the Complaint, and on that basis Dexon
 3 denies such allegations.

4 50. Dexon admits Plaintiffs served it with a subpoena relating to a lawsuit
 5 involving Plaintiffs, PureFutureTech and HongKong Sellsi and that Plaintiffs were
 6 ultimately required to file a motion relating to such non-party subpoena. Dexon denies the
 7 remaining allegations of paragraph 50 of the Complaint, including, without limitation, any
 8 allegation, suggestion or implication Dexon “refused to cooperate” with, or in any way
 9 failed to meet its obligations arising from, the subpoena.

10 **Dexon’s Purchases in 2017 to 2019 of Alleged Counterfeit Transceivers**
 11 **from PureFutureTech, Inc. (Fremont, California)**

12 51. Dexon admits purchasing Cisco product from PureFutureTech, Inc. in the
 13 period 2017-2019 but denies any such product was counterfeit. Dexon lacks sufficient
 14 information to admit or deny the remaining allegations in paragraph 51 of the Complaint
 15 and on that basis denies such allegations.

16 52. Dexon denies the allegations in paragraph 52 of the Complaint, including,
 17 without limitation, any allegation Dexon knew or reasonably should have known any Cisco
 18 product was allegedly counterfeit, or that Dexon was willfully blind to such alleged fact.

19 **Dexon’s Sales of Alleged Counterfeit Products to Murray State**
 20 **University (Murray, Kentucky) in 2018 and 2019 and Cisco’s C& Letter**

21 53. Dexon admits selling Cisco product to Murray State University (“MSU”) in
 22 or about 2018 and 2019, but denies the remainder of the allegations in paragraph 53 of the
 23 Complaint, including, without limitation, any allegation the product was counterfeit.

24 54. Dexon admits Plaintiffs sent a letter addressed to Dexon’s counsel relating to
 25 the MSU allegations, but Dexon denies the reminder of the allegations in paragraph 54 of
 26 the Complaint, including, without limitation, Plaintiffs’ attempted characterization of the
 27 letter which speaks for itself.

Dexon's July 2019 Sale of Alleged Counterfeit Cisco Products to MedRisk (King of Prussia, Pennsylvania)

55. Dexon admits selling Cisco product to MedRisk on or about July 2019, but denies the remainder of the allegations in paragraph 55 of the Complaint, including, without limitation, any allegation the product was counterfeit.

Dexon's September 2019 Sale of Alleged Counterfeit Cisco Products to Coppell Independent School District (Coppell, Texas) and Cisco's C&D Letter

56. Dexon admits selling Cisco product to Coppell Independent School District ("CISD") on or about September 2019, but denies the remainder of the allegations in paragraph 56 of the Complaint.

57. Dexon denies any allegation, suggestion or implication in paragraph 57 of the Complaint that Cisco product it sold to CISD was counterfeit. Dexon lacks sufficient information to admit or deny the remainder of the allegations in paragraph 57 of the Complaint and on that basis denies such allegations.

58. Dexon admits Plaintiffs sent a letter addressed to Dexon's counsel relating to the CISD allegations, but Dexon denies the reminder of the allegations in paragraph 58 of the Complaint, including, without limitation, Plaintiffs' attempted characterization of the letter which speaks for itself.

Dexon's Alleged California Directed Conduct Identified Through Jurisdictional Discovery

59. Dexon admits Plaintiffs conducted jurisdictional discovery herein, but denies the remainder of the allegations in paragraph 59 of the Complaint, including, without limitation, Plaintiffs' characterization of such jurisdictional discovery, as well as any allegation such discovery revealed any "illegal and tortious" conduct by Dexon in California or elsewhere.

Dexon's Sale of Alleged Counterfeit Cisco Products to California Customers

60. Dexon denies the allegations in paragraph 60 of the Complaint.

Dexon's Sale of Alleged Counterfeit Cisco Licenses to California Customers

61. Dexon admits Cisco has transmitted software licenses via Product Activation Key Certificates ("PAK") and that such PAKs have included a code that allows users to utilize the subject software. Dexon denies the remainder of the allegations in paragraph 61 of the Complaint.

62. Dexon denies the allegations in paragraph 62 of the Complaint.

63. Dexon denies the allegations in paragraph 63 of the Complaint.

64. Dexon denies the allegation in paragraph 64 of the Complaint.

**FIRST PURPORTED CLAIM FOR RELIEF
Federal Trademark Infringement
(15 U.S.C. § 1114)**

65. Dexon restates and incorporates by reference its responses to the allegations in paragraphs 1-64 in response to the allegations in paragraph 65 of the Complaint.

66. Dexon denies the allegations of paragraph 66 of the Complaint.

67. Dexon denies the allegations of paragraph 67 of the Complaint.

68. Dexon denies the allegations of paragraph 68 of the Complaint.

69. Dexon denies the allegations of paragraph 69 of the Complaint.

70. Dexon denies the allegations of paragraph 70 of the Complaint.

71. Dexon denies the allegations of paragraph 71 of the Complaint.

72. Dexon denies the allegations of paragraph 72 of the Complaint.

**SECOND PURPORTED CLAIM FOR RELIEF
Federal Trademark Counterfeiting
(15 U.S.C. § 1114)**

73. Dexon restates and incorporates by reference its responses to the allegations in paragraphs 1-72 in response to the allegations in paragraph 73 of the Complaint.

74. Dexon denies the allegations of paragraph 74 of the Complaint.

75. Dexon denies the allegations of paragraph 75 of the Complaint.

76. Dexon denies the allegations of paragraph 76 of the Complaint.

77. Dexon denies the allegations of paragraph 77 of the Complaint.

1 78. Dexon denies the allegations of paragraph 78 of the Complaint.

2 79. Dexon denies the allegations of paragraph 79 of the Complaint.

3 **THIRD PURPORTED CLAIM FOR RELIEF**
4 **False Designation of Origin**
5 **(15 U.S.C. § 1125)**

6 80. Dexon restates and incorporates by reference its responses to the allegations
7 in paragraphs 1-79 in response to the allegations in paragraph 80 of the Complaint.

8 81. Dexon denies the allegations of paragraph 81 of the Complaint

9 82. Dexon denies the allegations of paragraph 82 of the Complaint.

10 83. Dexon denies the allegations of paragraph 83 of the Complaint.

11 84. Dexon denies the allegations of paragraph 84 of the Complaint.

12 85. Dexon denies the allegations of paragraph 85 of the Complaint.

13 **FOURTH PURPORTED CLAIM FOR RELIEF**
14 **California Unfair Business Practices**
15 **(Cal. Bus. & Prof. Code §§ 17200 et seq.)**

16 86. Dexon restates and incorporates by reference its responses to the allegations
17 in paragraphs 1-85 in response to the allegations in paragraph 86 of the Complaint.

18 87. The allegations in paragraph 87 of the Complaint are legal conclusions of law
19 regarding California Business and Professions Code §§ 17200 et seq to which no response
20 is required. To the extent such allegations imply or suggest Dexon has in any way violated
21 California Business and Professions Code §§ 17200 et seq Dexon denies such allegations.

22 88. Dexon denies the allegations of paragraph 88 of the Complaint.

23 89. Dexon denies the allegations of paragraph 89 of the Complaint.

24 90. Dexon denies the allegations of paragraph 90 of the Complaint.

25 91. Dexon denies the allegations of paragraph 91 of the Complaint.

26 92. Dexon denies the allegations of paragraph 92 of the Complaint.

27 **FIFTH PURPORTED CLAIM FOR RELIEF**
28 **Unjust Enrichment**
(Common Law)

93. Dexon restates and incorporates by reference its responses to the allegations
in paragraphs 1-92 in response to the allegations in paragraph 93 of the Complaint.

1 94. Dexon admits the allegations of paragraph 94 of the Complaint.

2 95. Dexon denies the allegations of paragraph 95 of the Complaint.

3 **AFFIRMATIVE DEFENSES**

4 Without admitting any wrongful conduct on the part of Dexon, and without
5 admitting that Plaintiffs claims have any merit or that Plaintiffs have suffered any loss,
6 damage, or injury, Dexon alleges the following affirmative defenses to the Complaint. By
7 designating the following as affirmative defenses, Dexon does not in any way waive or
8 limit any defenses which are or may be raised by their denial, allegations, and averments
9 set forth herein. These defenses are pled in the alternative, are raised to preserve the rights
10 of Dexon to assert such defenses, and are without prejudice to Dexon's ability to raise
11 other and further defenses. Dexon expressly reserves all rights to reevaluate their defenses
12 and/or assert additional defenses upon discovery and review of additional documents and
13 information, upon the development of other pertinent facts, and during pretrial proceedings
14 in this action. Dexon expressly incorporate all allegations of its Answer, Counterclaims
15 and Cross-Claims as if fully set forth in each of the following affirmative defenses.

16 **FIRST AFFIRMATIVE DEFENSE**
17 **(Res Judicata and Collateral Estoppel)**

18 96. Plaintiffs' claims and/or recovery are barred, in whole or in part, by the
19 doctrines of res judicata and collateral estoppel.

20 **SECOND AFFIRMATIVE DEFENSE**
21 **(Laches)**

22 97. Plaintiffs' claims and/or recovery are barred, in whole or in part, by the
23 doctrine of laches. Plaintiffs' have had longstanding knowledge concerning the legal open
24 or "secondary" market for its products and have proactively engaged in unfair and tortious
25 behavior in an effort to selectively manipulate and control such secondary market to their
26 advantage. Plaintiffs have had longstanding specific knowledge of Dexon's activity in the
27 legal secondary market since well before 2011, yet have failed to take timely action to assert
28 their claims herein, resulting in substantial prejudice to Defendants.

THIRD AFFIRMATIVE DEFENSE
(Estoppel)

98. Plaintiffs' claims and/or recovery are barred, in whole or in part, by the doctrine of estoppel. Plaintiffs' advertises that consumers can purchase their products from their "Authorized Channel Partners" or "Authorized Resellers." Plaintiffs have known, or should have known such "Authorized Channel Partners" and/or "Authorized Resellers" participate in and sell their products on the secondary market. Plaintiffs have allowed these "Authorized Channel Partners" and/or "Authorized Resellers" to maintain their "authorized" status despite knowledge of their participation in the secondary market, including evidence of their sale of counterfeit Cisco products. Plaintiffs know, or should have reasonably known, that secondary market resellers such as Dexon rely upon Plaintiffs' endorsement of such "authorized" vendors when sourcing Cisco products, including, without limitation, procuring Cisco product from such "authorized vendors" end customers. Plaintiffs have also actively contributed to the presence of counterfeit product in the marketplace by, without limitation, failing to properly police and control their manufacturers and failing to properly manage their product serial numbers. As one example, Plaintiffs "authorized" vendors intentionally modify or change product serial numbers in order to ensure the subject product(s) qualify for Plaintiffs' SmartNet service packages. Plaintiffs are therefore estopped from pursuing claims against Dexon or seeking damages related to alleged counterfeit products.

FOURTH AFFIRMATIVE DEFENSE
(First Sale Doctrine and Exhaustion)

99. Plaintiffs' claims and/or recovery are barred, in whole or in part, by the first sale doctrine, which protects secondary market resellers such as Dexon from liability for the purchase, importation, and resale of genuine Cisco products and exhausts Plaintiffs' rights in further transactions.

FIFTH AFFIRMATIVE DEFENSE
(Statutes of Limitations)

100. Plaintiffs' claims and/or recovery are barred, in whole or in part, by applicable statutes of limitations, including but not limited to CAL. CIV. PROC. CODE §§ 337–38, CAL. BUS. & PROF. CODE § 17208, and 17 U.S.C. § 507. Some or all of Plaintiffs' claims involve conduct outside of the applicable statutes of limitations.

SIXTH AFFIRMATIVE DEFENSE
(Waiver)

101. Plaintiffs' claims and/or recovery are barred, in whole or in part, by the doctrine of waiver. Plaintiffs have promoted and advertised its “authorized” sellers despite having full knowledge certain such “authorized” sellers: i) have been caught selling counterfeit product; and ii) actively and regularly deal with secondary market resellers such as Dexon. Secondary market resellers such as Dexon have understandably relied upon Plaintiffs' promotion and endorsement of such “authorized” sellers when sourcing Cisco products for their customers. Plaintiffs have also intentionally failed or refused to provide or offer their claimed “tools” for detecting counterfeit product to secondary market resellers such as Dexon, and have actively contributed to the presence of counterfeit product in the marketplace by, without limitation, failing to properly police and control their manufacturers and failing to properly manage their product serial numbers. Plaintiffs have also had longstanding specific knowledge of Dexon's activity in the legal secondary market since well before 2011, yet have failed to take timely action to assert their claims herein. Accordingly, Plaintiffs have waived any claims related to Dexon's unwitting sale of alleged counterfeit goods, including any such goods sourced directly or indirectly from Plaintiffs' “authorized” vendors.

SEVENTH AFFIRMATIVE DEFENSE
(Unjust Enrichment)

102. Plaintiffs' claims and/or recovery are barred, in whole or in part, by the doctrine of unjust enrichment. Plaintiffs have engaged in unfair and tortious practices and made misrepresentations to consumers regarding: i) the quality and authenticity of products sold by secondary market resellers such as Dexon; and ii) Plaintiffs' rights to restrict

1 consumers use and transfer of Cisco hardware and software. Such conduct has improperly
2 steered customers from Dexon to Plaintiffs and unjustly enriched Plaintiffs.

3 **EIGHTH AFFIRMATIVE DEFENSE**
4 **(Unclean Hands/Inequitable Conduct)**

5 103. Plaintiffs' claims and/or recovery are barred, in whole or in part, by the
6 doctrines of unclean hands, inequitable conduct, and similar defenses. Without limitation,
7 Plaintiffs have: (i) intentionally misled consumers into thinking that genuine products on
8 the secondary market are used, counterfeit, or stolen, (ii) sold products to resellers whom it
9 knew, or should have known, were reselling the products on the secondary market, (iii) held
10 out certain entities as "Authorized Resellers" even though Plaintiffs knew or should have
11 known these entities sold counterfeit goods, and engaged in other inequitable practices that
12 bar recovery on its claims.

13 **NINTH AFFIRMATIVE DEFENSE**
14 **(Redundancy)**

15 104. Plaintiffs' claims and/or recovery are barred, in whole or in part, because they
16 are redundant and/or duplicative of one another.

17 **TENTH AFFIRMATIVE DEFENSE**
18 **(Abandonment)**

19 105. Plaintiffs' claims and/or recovery are barred, in whole or in part, by
20 abandonment of any marks at issue. Plaintiffs' have failed to properly police and exercise
21 adequate quality control over its marks and have thereby abandoned their rights therein.

22 **ELEVENTH AFFIRMATIVE DEFENSE**
23 **(Conduct of Others)**

24 106. Plaintiffs' claims and/or recovery are barred, in whole or in part, because the
25 conduct complained of is the conduct of others, including, without limitation, Plaintiffs'
26 "authorized" vendors and/or Plaintiffs' licensed manufacturers.

27 **TWELVE AFFIRMATIVE DEFENSE**
28 **(Failure to Mitigate)**

107. Plaintiffs' claims and/or recovery are barred, in whole or in part, because Plaintiffs failed to mitigate, minimize, or attempt to avoid damages. Without limitation, Plaintiffs could have pursued legal remedies earlier, assisted secondary market resellers like Dexon in detecting and fighting counterfeit products, and/or properly policed and prevented the manufacture and distribution of counterfeit product within their own manufacturing and distribution network.

THIRTEENTH AFFIRMATIVE DEFENSIVE
(Lack of Personal Jurisdiction)

108. Plaintiffs are barred from pursuing their claims against Dexon in this Court because the Court lacks personal jurisdiction over Dexon.

FOURTEENTH AFFIRMATIVE DEFENSIVE
(Improper Venue)

109. Plaintiffs are barred from pursuing their claims against Dexon in this Court because venue is improper.

FIFTEENTH AFFIRMATIVE DEFENSIVE
(Failure to State a Claim)

110. The Complaint, in whole or in part, fails to state any claim upon which relief can be granted.

SIXTEENTH AFFIRMATIVE DEFENSIVE
(One Satisfaction Rule / Bar on Double Recovery)

111. Plaintiffs' claims and/or recovery are barred, in whole or in part, by the one satisfaction rule and/or the bar on double recoveries.

COUNTERCLAIMS

112. Counterclaim Plaintiff Dexon Computer, Inc. asserts the following counterclaims against Counterclaim Defendants Cisco Systems, Inc., and Cisco Technology, Inc. (hereinafter referred to jointly as "Cisco") alleges as follows:

THE PARTIES

113. Defendant and Counterclaim Plaintiff Dexon Computer, Inc. (“Dexon”) is a Minnesota corporation with its principal place of business at 9201 E. Bloomington Freeway, Suite BB, Bloomington, Minnesota 55420.

114. On information and belief, Plaintiff and Counterclaim Defendant Cisco Systems, Inc. (“CSI”) is a Delaware corporation with its principal place of business at 170 W. Tasman Drive, San Jose, California 95134.

115. On information and belief, Plaintiff and Counterclaim Defendant Cisco Technology, Inc. (“CTI”) is a California corporation with its principal place of business at 170 W. Tasman Drive, San Jose, California 95134.

JURISDICTION

116. This Court has subject matter jurisdiction over Dexon’s counterclaims pursuant to 28 U.S.C. §§ 1367 and 1332. Dexon’s counterclaims arise out of the same controversy as plaintiffs’ Federal claims, there is complete diversity of citizenship between Plaintiffs and Dexon, and the amount in controversy exceeds seventy-five thousand dollars (\$75,000.00), exclusive of interest and costs.

FACTS

The Secondary Market for Cisco Products

117. As with any economic activity where there are significant profits, market forces have operated to create a “secondary” market for Cisco products. On information and belief, authentic or genuine Cisco products come to the secondary market in the United States in a variety of ways including: (a) Cisco’s knowing sale of such products to secondary market suppliers in the context of either specific end user deals or when Cisco needs to move inventory; (b) Cisco’s authorized resellers’ purchase of product in excess of what they need for a specific end user order and subsequent resale of such product into the secondary market; (c) Cisco end user’s resale of new, unused product; and (d) through importation of such product from abroad where it has been sold by distributors, resellers, or end users under similar circumstances. On information and belief, Cisco resists attempts

1 by end users and resellers to return product, resulting in a natural supply of secondary
2 market Cisco product.

3 118. Given the substantial profits available from sale of Cisco-branded products,
4 market forces dictate that a secondary market will develop for such products. These market
5 forces benefit end users in that they reduce prices for such products.

6 119. Dexon is an independent secondary-market reseller of computer networking
7 products, including routers, Ethernet switches and other computer hardware. Dexon
8 provides new, refurbished and discontinued hardware products, including authentic or
9 genuine products to its customers from leading manufacturers including, without limitation,
10 Hewlett Packard, Dell, Juniper Networks and Cisco.

11 120. Dexon obtains Cisco products from reliable suppliers, subjects such products
12 to extensive quality control, and then resells such products to other resellers and to end
13 users, at a profit but frequently at prices lower than those offered by Cisco “Authorized”
14 sellers.

15 121. Secondary market resellers of Cisco products, including Dexon, are highly
16 incentivized to detect and stamp out the sale of counterfeit goods. While a manufacturer
17 such as Cisco may blame rogue actors when a dissatisfied customer confronts it with a
18 counterfeit product, an independent reseller’s own reputation suffers significantly when it
19 sells a customer a counterfeit goods. Unsurprisingly, most independent resellers, including
20 Dexon, take proactive steps to detect and prevent the sale of counterfeit product.

21 122. Cisco has created an “Authorized Channel Network” in which Cisco sells
22 products to entities it refers to as “Authorized Channel Partners” or “Authorized Resellers.”
23 Within this “Authorized” network, Cisco exerts strict control over how, and at what prices,
24 its “Authorized” partners can buy and sell Cisco products.

25 123. “Authorized Reseller” status is not foolproof protection against counterfeit
26 products. Cisco’s “Authorized” sellers are likewise victimized by the presence of
27 counterfeit product in the marketplace and have been discovered to be selling counterfeit
28 Cisco product.

124. While manufacturers like Cisco are permitted to control the initial sale of their products, they may not wield trademark or copyright protections to dictate the terms by which their products are resold by other parties. The well-established “first sale doctrine” protects parties who engage in the subsequent resale of Cisco’s products, even if those subsequent resales occur outside the “Authorized” channels. Cisco may not forbid the resale of its products outside the “Authorized” network.

**Cisco’s Improper Intereference With Secondary Market:
Original Transaction a “Sale” not a “License”**

125. Cisco products, like virtually all modern electronics, contain embedded software. And just as a car, refrigerator, or cell phone will not function properly without internal software, Cisco’s products - including the Cisco products resold by Dexon - cannot function without Cisco’s embedded software. Likewise, such embedded software is not intended to be removed and has no independent value to the end consumer separate and apart from the Cisco product with which it is compatible.

126. Cisco uses the fact that its products have embedded software as an attempted end-around the first sale doctrine. It does so by falsely claiming the embedded software is governed by an “End User License Agreement” (“EULA”) which restricts subsequent transfer and use of any Cisco product containing such embedded software.

127. Cisco’s current purported EULA found at https://www.cisco.com/c/en/us/about/legal/cloud-and-software/end_user_license_agreement.html defines “Software” broadly to attempt to encompass embedded software. According to the definition, “ ‘Software’ means the Cisco computer programs including Upgrades, firmware and applicable Documentation.”

128. Cisco’s current EULA purports to provide a “non-transferable” license to use the “Software” except “as permitted under the Cisco Software Transfer and Re-Use Policy.” Cisco’s current purported EULA provides:

2.1. License and Right to Use. Cisco grants You a non-exclusive, non-transferable (except with respect to Software as permitted under the [Cisco Software Transfer and Re-Use Policy](#)) (a) license to use the Software; and (b) right to use the Cloud Services, both as acquired from an Approved Source, for Your direct benefit during the Usage Term and as set out in Your Entitlement and this EULA (collectively, the “Usage Rights”).

129. Cisco’s current purported “Software License Transfer and Re-Use Policy” found at https://www.cisco.com/c/dam/en_us/about/doing_business/legal/policy/Cisco_Software_Transfer_and_Relicensing_Policy.pdf provides that products containing embedded software acquired on the secondary market cannot be transferred or used without first paying an additional license fee. Such policy states:

Transfer Policy

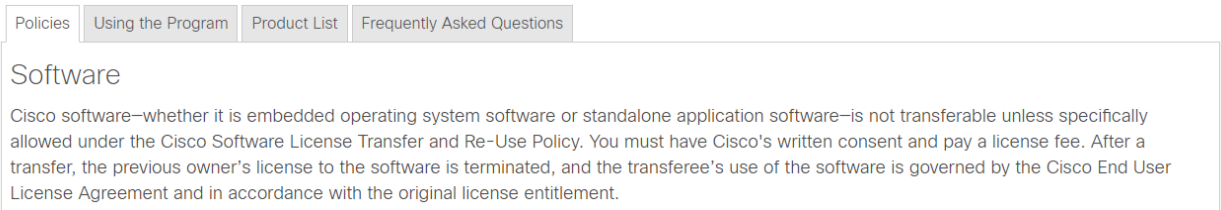
Unless prohibited by applicable law or expressly allowed by Cisco in the applicable license terms or otherwise provided below, Software is not transferable until and unless: (1) Cisco approves the Software Transfer Request Form referenced herein *and* (2) you pay any applicable license fees, including payment of all outstanding license fees invoiced and paid periodically. The transferee also may be required to pay service inspection or reinstatement fees in accordance with [Cisco policies](#) before any transfer is permitted.

130. As explained in detail below, no valid or enforceable EULA exists covering the embedded software. Rather, the facts and circumstances surrounding the original transactions confirm a sale of such products, including the embedded software, rather than the creation of any alleged or purported license governing the embedded software. Accordingly, Cisco’s attempts to notify secondary market purchasers of the purported EULA *after* the original sale, as well as Cisco’s repeated and ongoing form publications and advertisements advising secondary market purchasers that they have no right to transfer or use the embedded software, are false and misleading.

131. Cisco’s false claims concerning purported contractual restrictions on the transfer and use of such embedded software are not merely off the cuff “opinion” statements by lower level Cisco employees or representatives. Rather, Cisco has employed an intentional, coordinated, formalized and ongoing effort to utilize such false claims to deter

1 consumers from purchasing Cisco products on the secondary market (including from
2 resellers like Dexon).

3 132. In addition to the EULA and Software License Transfer and Re-Use Policy
4 referred to above, Cisco's current official "relicensing" website found at
5 <https://www.cisco.com/c/en/us/products/hw-sw-relicensing-program.html> provides as
6 follows:



13 133. The same Cisco "relicensing" website advises consumers that the purported
14 embedded software licenses are not transferrable and that any Cisco product purchased on
15 the secondary market must be relicensed. The current "relicensing" website found at
16 <https://www.cisco.com/c/en/us/products/hw-sw-relicensing-program.html#q2>: provides:

17 134. Cisco's current "FAQ" for "Third Party Maintenance Services and purchase
18 of Cisco Products outside the Authorized Channel" found online at
19 [https://www.cisco.com/c/dam/en_us/about/doing_business/legal/service_descriptions/doc](https://www.cisco.com/c/dam/en_us/about/doing_business/legal/service_descriptions/docs/Third_Party_Maintenance_Services_FAQ.pdf)
20 [s/Third_Party_Maintenance_Services_FAQ.pdf](https://www.cisco.com/c/dam/en_us/about/doing_business/legal/service_descriptions/docs/Third_Party_Maintenance_Services_FAQ.pdf) expressly states that product purchased on
21 the secondary market from a non "Cisco Channel Partner" does not come with a valid
22 software license:

23 **Q. If I buy Cisco product from a company who is not a Cisco Channel Partner, will I have a valid**
24 **software license?**

25 **A. No, unless the Cisco product successfully passes an inspection and any applicable relicensing fees**
26 **are paid or it meets an exception contained in Cisco's Software License Transfer and Re-Use Policy.**

27 135. Cisco also sends vetted and approved form letters from its "Brand Protection
28 Team" to secondary market customers stating that only the "initial purchasers" of Cisco

1 product are entitled to the benefits of the purported EULA. Such letters are intended to
 2 scare consumers into believing that products purchased on the secondary market may not
 3 work or that such consumers are not authorized to utilize embedded software contained in
 4 Cisco products purchased from secondary market sellers like Dexon.

5 136. Specifically, Cisco's "Brand Protection Team" form letters define any Cisco
 6 product purchased from secondary market resellers such as Dexon as "unauthorized." Such
 7 form letters then falsely claim that "any" such "unauthorized product does not have a valid
 8 software license."

9 137. For example, a March 14, 2019, Cisco Brand Protection Team form letter to
 10 Dexon customer Lockridge Grindal Nauen stated in relevant part:

Please be informed Dexon is NOT a member of the Cisco Authorized Reseller Program.
 Regardless of what Dexon claims, and regardless of whether its Cisco product is used or is in new
 sealed boxes, ANY Cisco product it supplies is considered unauthorized.

1. Unauthorized product is not eligible for any Cisco OEM warranty
2. Unauthorized product is not automatically eligible for SMARTnet
3. Unauthorized product does not have a valid software license.

For a detailed list of authorized Cisco Channel Partners, please refer
 to <http://www.cisco.com/go/partnerlocator>.

The following policy statement applies, whether the product is used or is in new, unopened and
 sealed boxes.

When products are not sold through Cisco's authorized sales channels, Cisco can offer no
 assurance as to the provenance, quality, or authenticity of those products. Additionally, when
 resellers resell Cisco products that have been sourced from outside of Cisco's authorized sales
 channels, those products do not come with a valid software license or hardware warranty and are
 not automatically eligible for a Cisco service support contract (such as SMARTnet maintenance).

1 An overview of Cisco's policy on this subject is as follows:

2 **Licensing.** When Cisco sells its products, software licenses (such as for Cisco IOS) are
 3 granted to the initial purchasers of those products. Cisco's policy is that software may
 4 not be transferred to any other purchaser of the product unless specifically authorized by
 5 Cisco. To the extent that Cisco believes a customer is not an initial purchaser—or if a
 6 customer expresses concern that it is not an initial purchaser—such issues will be
 promptly addressed and Cisco is committed to resolving all licensing issues that arise. In
 full, this policy is set forth on Cisco's
 website: http://www.cisco.com/en/US/prod/cisco_software_transfer_relicensing_policy.html.

7
 8 138. Contrary to Cisco's representations, no valid or enforceable license exists
 9 covering the embedded software. Rather, the facts and circumstances surrounding the
 10 original transactions confirm a *sale* of such products, including the embedded software,
 11 rather than the creation of any alleged or purported license governing the embedded
 12 software.

13 **The Purchasing Process**

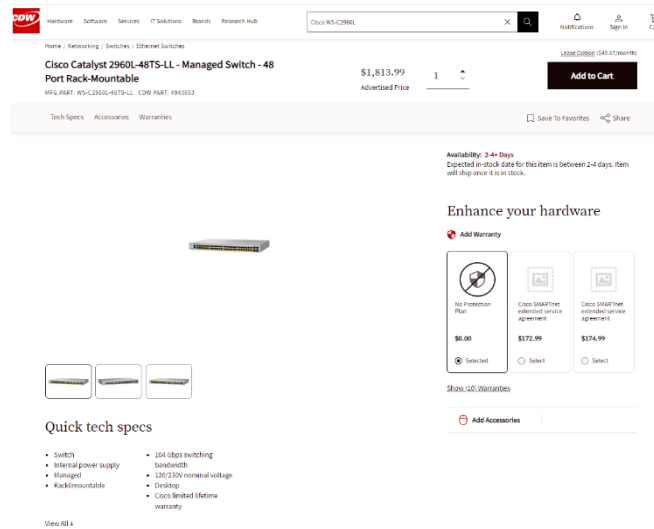
14 139. Cisco sells new, unopened product to its authorized resellers. Upon
 15 information and belief, these sales come in substantial quantities, sometimes in the
 16 thousands of individual products.

17 140. Upon information and belief, Cisco's authorized resellers accept the risk that
 18 the brand-new Cisco products, including the embedded software, may be damaged or lost.
 19 Cisco makes it extremely difficult for its authorized resellers to return any products.

20 141. Cisco's authorized resellers offer the Cisco products for sale to consumers.
 21 Such authorized resellers make it extremely difficult to for consumers to return any
 22 products.

23 142. As shown and explained below, the original consumer transaction involving
 24 the Cisco products is a "sale" of both the hardware and any associated embedded software.
 25 There is no creation of a license covering the embedded software. Rather, Cisco's
 26 authorized resellers state that Cisco switches come with a "Cisco limited lifetime warranty"
 27 without mention that the warranty is subject to any restrictions or that the product comes
 28 embedded with software subject to a license. CDW and other authorized resellers offer

additional “[e]nhance[ments]” for the hardware, like Cisco SmartNet extended service agreements.



143. Cisco’s authorized reseller’s do not provide original purchasers any notice prior to purchase that there is embedded software in the product or that such embedded software is governed by a license restricting the original purchaser’s ability to transfer or sell the subject product.

144. Attached as Exhibit A is a true and correct copy of an October 15, 2020 invoice from Cisco authorized reseller CDW Direct for a Cisco Catalyst 9200L switch costing \$856.47. The invoice provides a single, flat price for the switch. The invoice does not provide a separate itemized price for the switch’s embedded software. In fact, the invoice contains absolutely no mention of a separate or independent license agreement governing the switch’s embedded software.

145. The sole reference to “software” is buried in the small print of the attempted “Terms and Conditions” located on the back side of the CDW invoice.

146. The attempted “Terms and Conditions” include a “Title; Risk of Loss” section which begins by placing the risk of loss or damage during shipment on the purchaser. It then adds, in small lowercase print, that “title to software will remain with the applicable licensor(s), and Customers rights therein are contained in the license agreement between

1 such licensor(s) and Customer.” Such notice contains no reference to “embedded
2 software.”

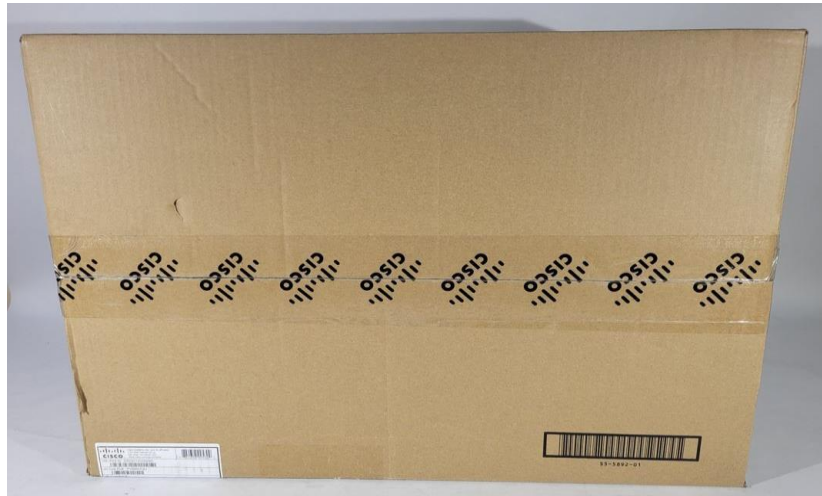
3 147. Cisco does offer several stand alone and independent traditional software
4 licenses, including, without limitation, licenses governing its Digital Network Architecture
5 (“DNA”) network management services. Cisco’s authorized resellers provide separate
6 invoices or line items covering such traditional software licenses. Accordingly, to the
7 extent original purchasers actually read the small print “Terms and Conditions,” such
8 purchasers would have no way of knowing the referenced “software” applied to embedded
9 software as opposed to traditional stand-alone software sold and priced separately.

10 148. In addition to failing to properly notify original purchasers prior to their
11 purchase that their ability to subsequently transfer or sell the expensive Cisco products is
12 restricted by a purported EULA governing the hardware’s embedded software, at no time
13 does Cisco or its Authorized Resellers obtain the purchasers assent to any purported EULA.

14 149. At no time has Cisco or its Authorized Resellers placed a notice or warning
15 of a purported EULA on the exterior packaging of any of its hardware. Moreover, such
16 packaging contains no notice or warning advising purchasers that by opening such
17 packaging they would be assenting or agreeing to Cisco’s alleged EULA governing the
18 embedded software. Below are representative photographs of the exterior packaging for a
19 Cisco WS-C2960L switch:



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150. Rather than properly notifying original purchasers of the purported EULA governing the embedded software and obtaining their affirmative assent, Cisco has included various attempted notices on the *inside* of the product packaging. Such notices are accessible only *after* the products have been purchased and opened.

151. Resellers such as Dexon sell a large volume of new, in the box, never opened Cisco products, meaning at no point were such attempted “notices” ever accessed or viewed by the original purchaser.

152. Dexon sells such brand-new, in the box, never opened Cisco product to end users like schools, hospitals, and businesses. The individuals opening or accessing such Cisco products are often lower-level information technology personnel charged with installing such equipment. In addition to generally being required to install such equipment in short time frames with little or no opportunity for locating, reviewing and studying any purported EULA governing the embedded software, such IT professionals often have no control over or involvement with purchasing or return decisions.

153. The attempted notices Cisco has included inside the product packaging have varied through the years. For example, an unopened package for a Cisco WS-C2960L switch originally sold on or about 2009 included a separate plastic bag of accessories inside

1 the product packaging. The plastic bag bears a green sticker providing, “Please read the
 2 license terms regarding the use of the product included inside this box. By using the
 3 product, you agree to be bound by these license terms. If you do not agree with these terms,
 4 promptly return the unused product, manual, related equipment and hardware (with proof
 5 of payment) to the place of purchase for a full refund”:



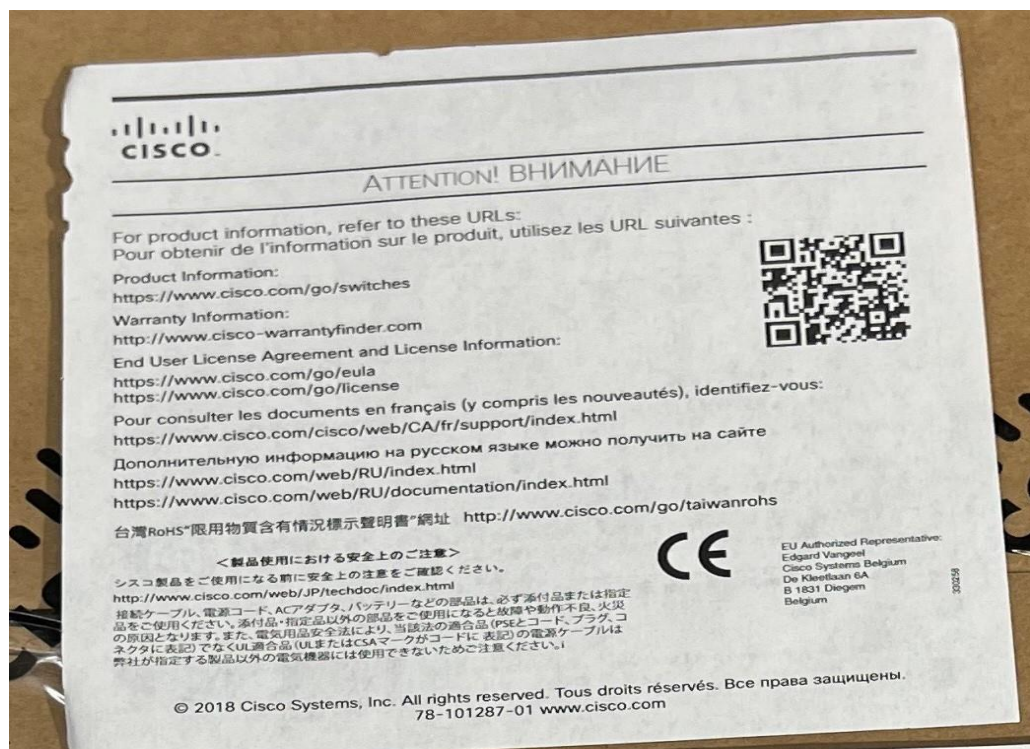
154. The referenced licensed terms supposedly to be found “inside this box” are
 in fact buried in and difficult to access within a “Getting Started Guide” CD included in the
 plastic bag:



155. The “Getting Started Guide” CD is not required to be utilized or accessed by the IT professional as part of the install process. Rather, as the name implies, it is in fact a “Getting Started Guide” containing instructions. The CD does not contain any software required to be loaded or accessed as part of the installation process and would have been routinely ignored as unnecessary or superfluous by experienced IT professionals.

156. At some unknown time, Cisco stopped including the green sticker or the “Getting Started Guide” CD. In fact, Cisco stopped providing or including *any* copy of the purported EULA governing the embedded software with its products.

1 157. Rather, Cisco began including a small single page notice directing the user to
 2 various websites. Such “product information” notice contains no warning that use of the
 3 product constitutes acceptance of Cisco’s purported EULA governing the embedded
 4 software or that the consumer’s subsequent use of the product will be restricted. Rather,
 5 the notice requires the individual who opened the package, often a lower level IT
 6 professional having no responsibility for purchasing or return decisions, to go to a separate
 7 URL or website:



22 158. Subsequent to the introduction of its DNA network management services,
 23 Cisco also began including separate notices governing independent and separate licenses
 24 for such network management services.

25 159. In addition to failing to provide any proper notice of a purported EULA
 26 governing the embedded software, at no point has Cisco required or obtained any
 27 affirmative assent to such purported EULA by the original purchaser. For example, an
 28 original purchaser who actually goes to the referenced website is not required to

1 affirmatively accept the purported EULA governing the embedded software via a “click
2 through” process or otherwise.

3 160. Moreover, no such affirmative assent to the purported EULA governing the
4 embedded software is required for the original purchaser to actually use the subject Cisco
5 products. Without limitation, at no point during the “boot up” process is an end user advised
6 of any purported EULA governing the embedded software or asked to provide affirmative
7 assent to any such purported EULA via a “click through” process or otherwise. Upon
8 information and belief, downstream purchasers and end users first become aware of Cisco’s
9 contention their use and transfer of the product is restricted by a purported EULA governing
10 the embedded software via communications from Cisco’s Brand Protection Team *years*
11 *after* the original purchase.

12 161. In light of the absence of any evidence of a valid or enforceable EULA
13 governing the embedded software, the original transaction involving the subject Cisco
14 products constitutes a “sale” of both the hardware and associated embedded software. As
15 a result, Cisco’s form advertisements and publications advising secondary market
16 purchasers that they are prohibited from using and transferring Cisco products are false and
17 misleading and violate the first sale doctrine codified at 17 U.S.C. § 109. Cisco does not
18 offer or enter into a license for the subject embedded software and does not control the use
19 of such embedded software.

20 162. In addition to the fact that any purported EULA is not valid or enforceable,
21 relevant and applicable versions of Cisco’s prior purported “Software License Transfer and
22 Re-licensing Policy” expressly allow the use and transfer of Cisco products by secondary
23 market purchasers. Cisco’s claimed “Software License Transfer and Relicensing Policy”
24 applicable to products originally sold during 2012-2017 provides that there is no restriction
25 on transfer “[i]n situations where the Products combine Hardware and Software and there
26 is no separate product code or License Fee charged for the Software on the applicable Cisco
27 then-current published price list at the time of transfer (and therefore a separate License Fee
28 for the Software cannot be determined). . .” (On information and belief, such “exception”

1 was included in Cisco's "Software License Transfer and Relicensing Policy" at least from
 2 2012 to some unknown date in 2017 when such policy was apparently revised. The full
 3 and exact dates such "exception" was included in Cisco's policy is in Cisco's possession
 4 and control.) The full relevant provision or "exception" provides:

5
 6 Exceptions

7 1. Software Bundled with Hardware: In situations where Products
 8 combine Hardware and Software and there is no separate Product code or
 9 License Fee charged for the Software on the applicable Cisco then-current
 10 published price list at the time of transfer (and therefore a separate License
 11 Fee for the Software cannot be determined), an exception will be made to
 12 allow for the transfer without the transferee being required to pay a new
 13 License Fee.

14 163. On information and belief, Cisco's "published price list" contained no
 15 separate "Product code or License Fee" for embedded software included with products
 16 governed by Cisco's purported 2012-2017 "Software License Transfer and Re-licensing
 17 Policy."

18 164. Cisco's form advertisements and publications falsely advising secondary
 19 market purchasers that the embedded software is governed by a purported EULA
 20 prohibiting the subsequent transfer and use of Cisco products fails in any way to distinguish
 21 or delineate products governed by versions of Cisco's "Software License Transfer and Re-
 22 licensing Policy" expressly allowing the transfer and use of such embedded software,
 23 including, without limitation, products sold by Cisco or Cisco authorized resellers to the
 24 original consumers or end users during 2012-2017.

25 165. Dexon has regularly sold, and continues to sell, new, unopened, in the box,
 26 as well as used, Cisco products for, without limitation, model years 2009 to the present.
 27 This has included, and will continue to include, new, unopened, in the box, as well as used,
 28 Cisco products originally sold by Cisco or Cisco authorized resellers to the original

1 consumers or end users during 2012-2017 and covered by Cisco's purported 2012-2017
2 "Software License Transfer and Re-licensing Policy."

3 166. Consumers who purchase Cisco products on the secondary market may use
4 the embedded software included therewith because the title of the product and embedded
5 software is transferred to them. They may also transfer the Cisco products, including the
6 embedded software, freely. They also accept all risk that the product with embedded
7 software may be lost or damaged.

8 167. When consumers receive the Cisco Brand Protection Team form
9 advertisements and publications, they falsely believe that they cannot use the product or
10 that the product will not work. There is no license covering the embedded software; rather,
11 any "licenses" apply to add-on "enhanced" software features like DNA. Because there is
12 no license that covers the embedded software, and no assent to any such purported license,
13 Cisco's form advertisements and publications stating that the embedded software is
14 governed by a purported license which restricts the use and disposition of the Cisco product
15 is false. Downstream consumers, including secondary market purchasers, can use the
16 embedded software without ever buying a separate or independent license from Cisco.

17 168. When Dexon's customers receive Cisco's form advertisements and
18 publications, including, without limitation, Cisco's form Brand Protection Team letters,
19 they falsely believe they cannot use the subject Cisco product or that the subject Cisco
20 product will not work because they believe, falsely, that they have to purchase a separate
21 license. They don't.

22 169. Cisco's form advertisements and publications are particularly egregious
23 because they fail to delineate between products governed by Cisco's current purported
24 EULA and "Software License Transfer and Re-Use Policy" and products governed by prior
25 versions which expressly allow secondary market purchasers to transfer and use Cisco's
26 embedded software.

27 170. Although a customer purchasing a new, never opened, in the box Cisco
28 product from Dexon is unlikely to ever visit the EULA website identified inside the

1 package, if a customer does, it would be viewing Cisco's current EULA or "Software
2 License Transfer and Re-Use Policy" with the applicable "exception" removed. Customers
3 with product originally sold by Cisco or a Cisco authorized reseller to the original
4 consumers or end users during 2012-2017 are not directed to the applicable earlier versions
5 containing the "exception." Cisco is misleadingly and improperly attempting to change or
6 modify the terms of the purportedly applicable EULA *after* the original transaction.

7 171. Likewise, Cisco's other false and misleading advertisements and publications
8 referenced above, including Cisco's "relicensing" website, Cisco's "FAQ" for "Third Party
9 Maintenance Services and purchase of Cisco Products outside the Authorized Channel,"
10 and Cisco's form "Brand Protection Team" letters, all of which falsely claim secondary
11 market purchaser have no right to transfer or use the embedded software, fail to delineate
12 products governed by Cisco's purported 2012-2017 EULA and "Software License Transfer
13 and Re-licensing Policy" expressly allowing such transfer and use.

14 172. Cisco's has and will continue to falsely and intentionally misrepresent that
15 secondary market purchasers' use and transfer of embedded software is prohibited despite
16 the fact that: i) the original transaction was a sale of the embedded software and no valid
17 or enforceable software license was created; and ii) the correct applicable purported license
18 expressly allows such transfer and use.

19 173. Cisco's past and ongoing misrepresentations regarding the terms,
20 applicability, scope and interpretation of a purported EULA governing the embedded
21 software and secondary market purchasers' rights to buy, use and transfer secondary-market
22 Cisco products deters consumers from purchasing Cisco products on the secondary market.
23 Dexon has lost and will continue to lose sales of products that would have been made but
24 for Cisco's false representations to consumers regarding the terms, applicability, scope and
25 interpretation of Cisco's purported EULA and the consumers' ownership rights for Cisco
26 hardware and associated embedded software purchased on the secondary market. These
27 false representations have unjustly enriched Cisco at Dexon's expense.

Cisco's Tortious Interference with Dexon's Business

174. Because Cisco regards secondary market resellers like Dexon as a threat to its excess profits, Cisco spends substantial money and effort to attack secondary market participants such as Dexon and to chill reseller and end user participation in the secondary market. These steps include but are not limited to employing a team of "Brand Protection" employees whose primary responsibility is to intervene with resellers and end users in cases where they are either contemplating the purchase of product, or have ordered product, from the secondary market.

175. Cisco Brand Protection personnel use a variety of tools to disrupt secondary market sales, including, without limitation, falsely advising Dexon's actual and prospective customers that: i) Dexon does not sell new but rather "used" or "refurbished" Cisco product; ii) Dexon's products are "counterfeit" solely because they were sold on the secondary market despite the fact such products are in fact genuine; iii) Dexon products violate a purported EULA despite the absence of any proper notice of or assent to the purported EULA; iv) Dexon products violate the purported EULA even though the purported EULA does not even apply to the applicable product; and v) Dexon products violate the purported EULA even though the actual governing purported EULA, including, without limitation, Cisco's 2012-2017 purported EULA and "Software License Transfer and Relicensing Policy" expressly allows the use and transfer of embedded software.

176. Cisco has engaged in a pattern and practice of this tortious conduct with the intent to disrupt contracts between Dexon and its customers, pending opportunities with such customers, future business with such customers, and even with the apparent goal of driving Dexon out of business altogether.

Fort Bend Independent School District

177. Dexon entered into a contract with Fort Bend Independent School District ("FBISD") for the sale and purchase of over \$1,300,000.00 in brand new Cisco equipment. On or about June 24, 2019, Cisco representative Dan Roberts falsely advised and

1 represented to FBISD representative Cecile Thompson that the equipment FBISD was
2 purchasing from Dexon could not be new but rather had to “refurbished.”

3 178. On or about July 9, 2019, Sean O’Brien, a member of Cisco’s Brand
4 Protection Team, sent a letter to FBISD falsely claiming and representing that products sold
5 by Dexon do not come with a “valid software license.” Such letter stated: “According to
6 Cisco Systems’ records (www.cisco.com/go/eula), the Cisco goods listed in Exhibit A are
7 not recorded as being sold to Fort Bend Independent School District through one of Cisco’s
8 authorized resellers. It appears you may have purchased the Cisco goods from a company
9 name Dexon Computer. Unfortunately, Dexon Computer is not a member of the Cisco
10 authorized reseller program. As such, Cisco recommends that you return these goods for a
11 refund, along with any other Cisco products received by the vendor, and replace the items
12 with authorized Cisco products sold via an authorized reseller.”

13 179. Such letter further warned Dexon’s customer that such products “may not
14 come with a valid software license” and that “Customers purchasing most Cisco goods
15 outside of Cisco’s authorized sales channels *would not automatically have a license to use*
16 *the software.*” (italics added.)

17 180. As a direct and proximate result of such communications, FBISD falsely
18 believed the Dexon products may not be new and that it would not be able to use such
19 products due to the absence of a “valid software license.” As a direct and proximate result
20 of Cisco’s false and misleading representations, FBISD cancelled its \$1.3 million contract
21 with Dexon, and Dexon has received no further business opportunities from FBISD.

22 181. Cisco’s representations to FBISD are especially egregious considering the
23 contracted for products were Cisco phones rather than networking equipment containing
24 embedded software which Cisco contends is governed by a purported EULA. Upon
25 information and belief, unlike Cisco’s subject networking equipment, Cisco’s phones
26 utilize “open source” software. The phones do require a completely separate and
27 independent Cisco service and license to operate (Cisco Unified Communications Manager
28

1 which is commonly known as “CallManager”). Thus, Cisco’s statement that such products
2 would lack a “valid software license” were false and misleading.

3 **Lockridge Grindal and Nauen**

4 182. Without limitation, on or about March 14, 2019, Tim Casto, a member of
5 Cisco’s Brand Protection Team, sent a letter to Dexon customer Lockridge Grindal and
6 Nauen (“Lockridge”). Such letter falsely advised Dexon customer Lockridge that “six
7 switches” purchased from Dexon were “counterfeit.” On information and belief, only four
8 (4) of the six (6) switches are currently alleged to be counterfeit by Cisco.

9 183. The March 14, 2019 letter warned that “Dexon is NOT a member of the Cisco
10 Authorized Reseller Program” and that “[r]egardless of what Dexon claims, and regardless
11 of whether its Cisco product is used or is in new sealed boxes, ANY Cisco product it
12 supplies is consider unauthorized.” Such letter falsely represented that absolutely no
13 product obtained from Dexon comes with a “valid software license.”

14 184. In addition to the fact that the original transaction involving the Lockridge
15 products was a sale and no valid or enforceable license applicable to the embedded software
16 was created, on information and belief, all of the Lockridge products were sold by Cisco or
17 Cisco authorized sellers to the original consumer or end users between 2015-2017.
18 Accordingly, Cisco’s alleged or purported EULA applicable to such products expressly
19 allowed the embedded software to be transferred and used by secondary market purchasers.

20 185. As a direct and proximate result of the March 14, 2019 correspondence, as
21 well as other similar communications from and representations by Cisco’s Brand Protection
22 Team, Lockridge falsely believed all six (6) switches it purchased from Dexon were
23 counterfeit, that the switches would not work, and that it would not have the required
24 licenses necessary to use Cisco product purchased from Dexon. Citing the Brand Protection
25 Team correspondence, Lockridge demanded a refund of all amounts paid to Dexon. Dexon
26 lost all future business opportunities from Lockridge.

Accuray, Inc.

186. Without limitation, on or about , January 27, 2020, Tim Casto, a member of Cisco’s Brand Protection Team, sent an email to Dexon customer Accuray Inc. (“Accuray”). Such email acknowledged that products purchased by Accuray from Dexon had been determined to be authentic or “genuine.” However, the email falsely stated that because such genuine products were purchased on the secondary market, they “did not have a valid software license.” The email stated in relevant part, “Cisco reviewed the console readout and determined that the items are genuine. . .The below items, however, show as sold to end users other than Accuray. This means that the below products do not have a valid software license. . .”

187. In addition to the fact that the original transaction involving the products was a sale and no valid or enforceable license applicable to the embedded software was created, on information and belief, 23 of the 26 subject Accuray products were originally sold by Cisco or Cisco authorized sellers to the original consumers or end users between 2014-2017. Accordingly, Cisco’s alleged or purported EULA applicable to such products expressly allowed the embedded software to be transferred and used by secondary market purchasers.

188. As a direct and proximate result of the January 27, 2020 correspondence, as well as other similar communications from and representations by Cisco’s Brand Protection Team, Accuray falsely believed that the product would not work and that it did not have the required licenses necessary to use the Cisco products purchased from Dexon. As a result, Accuray demanded a refund of all amounts paid to Dexon. Dexon lost all future business opportunities from Accuray.

Meadowridge Networks, Inc.

189. Without limitation, on or about July 12, 2021, Shuting Li, on information and belief a member of Cisco’s Brand Protection Team, sent an email to Dexon customer Meadowridge Networks, Inc. (“Meadowridge”). Such letter falsely implied product purchased from Dexon was not new or not genuine. The email stated, “Serial number is

1 verified to be an unauthorized unit. . .because this unit is now in possession of end customer
2 which is different from the reported end customer. So it is an overseas diversion unit.”

3 190. As a direct and proximate result of the July 12, 2021 email, as well as other
4 similar communications from and representations by Cisco, Meadowridge understandably
5 understood Cisco to be claiming the products purchased from Dexon to be “used” and/or
6 counterfeit. In a responsive email, Meadowridge explained, “I am the first end-user to open
7 the box. . .This came to me in an unopened Cisco box and was not a ‘used’ unit in any sense
8 of the word. . .I had every reason to think that this was a legitimate unit and no reason to
9 believe that it wasn’t.”

10 191. Rather than clarify Meadowridge’s interpretation and misunderstanding of its
11 prior communications, Cisco responded by directing Meadowridge to a domain or website
12 containing a false and misleading definition of “used.” Namely, such definition defined
13 “used” as all Cisco products purchased on the secondary market. (See
14 www.cisco.com/go/relicensing which misleadingly defines “used” products as “previously
15 owned equipment that is now owned by a party other than the original customer” including
16 both “opened and unopened equipment.”

17 192. As a direct and proximate result of the Cisco Brand Protection Team
18 communications, Meadowridge falsely believed that its use of Cisco products purchased
19 from Dexon would be impaired or restricted and that the product would not work. As a
20 direct and proximate result, Meadowridge demanded a refund and was also provided a
21 replacement or substitute product at a reduced priced. Dexon has lost future business
22 opportunities from Meadowridge.

23 193. The foregoing false and misleading representations of fact were designed to
24 mislead consumers, and have in fact misled consumers, at the expense of Dexon, causing
25 direct and substantial loss and damage to Dexon.

26 194. Cisco’s false and misleading misrepresentations have caused, and unless
27 enjoined by this Court, will continue to cause irreparable injury to Dexon.

Count I
Declaratory Judgment
(28 U.S.C. §§ 2201-2202)

197. Dexon seeks a declaration of its rights, pursuant to 28 U.S.C. §§ 2201 & 2202, that the original transactions involving the subject Cisco products is a “sale” of both the hardware and any associated embedded software and that there exists no valid or enforceable license agreement governing the embedded software which prohibits the use or transfer of such products by subsequent secondary market purchasers.

199. No such valid or enforceable EULA exists.

201. Even if applicable, which it is not, the certain versions of Cisco’s EULA, including, without limitation Cisco’s purported 2012-17 EULA and “Software License Transfer and Re-licensing Policy” expressly allow the use and transfer of embedded software by secondary market consumers.

202. Accordingly, Cisco’s form communications and representations, including, without limitation, Cisco’s form advertisements and publications which fail to delineate products governed by Cisco’s purported 2012-17 EULA and “Software License Transfer

1 and Re-licensing Policy” which expressly allows the use and transfer of embedded software
2 by secondary market consumers, are and continue to be false and have caused and will
3 continue to cause significant harm and damage to secondary market sellers, including
4 Dexon.

5 203. A real legal dispute and actual controversy presently exists between the
6 parties to this action which is concrete and justiciable in character, and as to which each
7 party possesses an interest in resolving.

8 204. Dexon has in inventory Cisco products sold by Cisco or Cisco authorized
9 resellers to the original purchasers or end users from at least as early as 2009 to the present.
10 Because of the nature of the secondary market, Dexon will continue to receive such
11 products in inventory. Due to the nature of the secondary market, Dexon will continue to
12 receive more such products in inventory. Dexon has previously sold and will continue to
13 sell Cisco products sold by Cisco and/or Cisco’s authorized resellers to the original
14 consumers and end users in 2012-2017.

15 205. Cisco has continued and will continue its longstanding practice of sending
16 form advertisements and publications to Dexon’s actual and prospective customers falsely
17 advising such customers that the use and transfer of any Cisco products purchased from
18 Dexon is prohibited by a purported but invalid and unenforceable EULA. Cisco’s
19 communications have failed and will continue to fail to distinguish products governed by
20 versions of its purported EULA expressly allowing the use and transfer of embedded
21 software by secondary market purchases, including products sold by Cisco or Cisco’s
22 authorized resellers to the original purchasers or end users during 2012-2017 and governed
23 by Cisco’s purported 2012-2017 EULA and “Software License Transfer and Re-licensing
24 Policy.”

25 206. Unless and until Cisco’s form communications and representations are
26 deemed to be false, in violation of the first sale doctrine codified at 17 U.S.C. §109, or
27 contrary to Cisco’s own purported 2012-17 EULA and “Software License Transfer and Re-
28 licensing Policy” which expressly allows the use and transfer of embedded software by

1 secondary market consumers, Dexon's ability to sell such products will be wrongfully and
 2 unnecessarily impaired and Dexon will continue to be injured and damaged thereby.
 3 Accordingly, Dexon seeks declaratory relief from this Court.

4 207. The controversy between Dexon and Cisco warrants relief declaring the rights
 5 of the parties pursuant to 28 U.S.C. §§ 2201 & 2202, and finding that: i) original purchasers
 6 of Cisco products obtained the products and any associated embedded software via a "sale";
 7 ii) there is no valid or enforceable EULA governing the embedded software in Cisco
 8 products sold by Dexon on the secondary market; iii) even if applicable, valid and
 9 enforceable, which it is not, Cisco's purported 2012-17 EULA and "Software License
 10 Transfer and Relicensing Policy" expressly allows the use and transfer of embedded
 11 software by secondary market consumers; and iv) Dexon's customers' are free to use and
 12 transfer such products pursuant to the first sale doctrine codified at 17 U.S.C. §109.

13 **Count II**
 14 **Lanham Act False Advertising**

15 208. Dexon repeats and realleges each of the allegations set forth in the preceding
 16 paragraphs as if fully set forth herein.

17 209. Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), provides that it is
 18 unlawful for any person to use a "false or misleading description of fact, or false or
 19 misleading representation of fact, which . . . in commercial advertising or promotion,
 20 misrepresents the nature, characteristics, qualities, or geographic origin of his or her or
 21 another person's goods, services, or commercial activities."

22 210. As set forth above, Cisco has published in commercial advertising and
 23 promotion, and continues to publish in commercial advertising and promotion, false or
 24 misleading representations of fact regarding the software embedded in Cisco hardware sold
 25 on the secondary market.

26 211. In addition, Cisco has published in commercial advertising and promotion,
 27 and continues to publish in commercial advertising and promotion, false or misleading
 28 representations of fact regarding whether products in the secondary market are "used."

220. Dexon secured contracts with certain customers, including, without limitation, Fort Bend Independent School District, Lockridge, Meadowridge and Accuray for the sale of Cisco products on which Dexon would have earned significant profits.

221. On information and belief, Cisco knew or should have known of these contractual relationships between Dexon and these third party customers.

222. As detailed herein, Cisco intentionally, or with reckless disregard for the truth, made false and misleading statements about Dexon and the products it sells to these customers in order to disrupt the contractual relationship and to cause these customers to purchase product from Cisco authorized resellers at a higher price. Without limitation, Cisco falsely advised such customers they did not possess a valid license to use embedded software included with the subject products. With respect to Lockridge and Accuray, Cisco made such false and misleading statements despite knowing its purported 2012-17 EULA and “Software License Transfer and Re-license Policy” applicable to the subject products expressly allow the use and transfer of such embedded software.

223. Cisco’s statements in fact disrupted these contractual relationships between Dexon and its customers.

224. Dexon has suffered substantial economic damage as a result of this wrongful conduct in an amount subject to proof at trial.

225. Cisco’s actions have caused, and unless enjoined by this Court, will continue to cause irreparable injury to Dexon.

Count IV

Intentional Interference with Prospective Economic Advantage

226. Dexon repeats and realleges each of the allegations set forth in the preceding paragraphs as if fully set forth herein.

227. An economic relationship existed between Dexon and its actual and prospective customers, including, without limitation, Fort Bend Independent School District, Lockridge, Meadowridge, and Accuray, each of which contained the probability of substantial future economic benefits to Dexon.

1 228. On information and belief, Cisco knew or should have known of these
2 relationships.

3 229. As detailed herein, Cisco intentionally, or with reckless disregard, engaged in
4 tortious conduct designed to disrupt Dexon's potential benefit from these relationships.

5 230. Without limitation, Cisco falsely advised such customers they did not or
6 would not possess a valid license for embedded software included with any products
7 purchased from Dexon. Cisco made such false and misleading statements despite knowing:
8 i) Dexon has sold and will continue to sell products governed by Cisco's purported 2012-
9 17 EULA and "Software License Transfer and Re-license Policy": and ii) Cisco's
10 purported 2012-17 EULA and "Software License Transfer and Re-license Policy" expressly
11 allow the use and transfer of such embedded software.

12 231. Cisco's statements were made with the intent to disrupt the economic
13 relationship between Dexon and its potential and actual customers in order to damage
14 Dexon and or divert business to "Cisco Authorized Resellers" under Cisco's control.

15 232. Cisco's knew such statements were false and misleading or had a disregard
16 for whether such statements were true of false and misleading.

17 233. As a result of the efforts detailed above, Dexon's relationships with its
18 potential and actual customers have in fact been permanently disrupted and/or materially
19 damaged in a significant number of instances, including its future relationships. As a result
20 of Cisco's tortious efforts, Dexon's customers have refused to pay for certain Cisco goods,
21 have returned and/or cancelled orders for such goods, have removed Dexon's bids from
22 contention for business, and have ceased doing business with Dexon on other products
23 and/or altogether.

24 234. Dexon has suffered substantial economic damage as a result of this wrongful
25 conduct in an amount subject to proof at trial.

26 235. Cisco's actions have caused, and unless enjoined by this Court, will continue
27 to cause irreparable injury to Dexon.

28

Count V
Trade Libel

236. Dexon repeats and realleges each of the allegations set forth in the preceding paragraphs as if fully set forth herein.

237. On information and belief, Dexon alleges that Cisco has repeatedly made disparaging and false statements about Dexon's products as detailed herein, including, without limitation, the statements and representations detailed above to Dexon customers Fort Bend Independent School District, Lockridge, Meadowridge and Accuray. As detailed herein, such false and disparaging statements included, without limitation: i) falsely claiming all the products sold by Dexon to Lockridge were counterfeit; ii) falsely claiming the products Dexon had contracted to sell to FBISD were "refurbished" rather than new; and iii) that such Dexon customers did not possess or would not possess a valid license for embedded software included with any products purchased from Dexon.

238. Cisco made such disparaging and false statements despite knowing: i) Dexon has sold and will continue to sell products governed by Cisco's purported 2012-17 EULA and "Software License Transfer and Re-license Policy"; and ii) Cisco's purported 2012-17 EULA and "Software License Transfer and Re-license Policy" expressly allow the use and transfer of such embedded software.

239. Cisco's statements disparaged Dexon's products. On information and belief, Dexon alleges that the claims made were false or materially misleading.

240. Cisco intentionally made such statement knowing such statements were false and misleading or having a complete disregard for whether such statements were true or false and misleading.

241. Dexon has suffered and will continue to suffer irreparable harm should Cisco's trade libel be allowed to continue.

242. As a proximate result of Cisco's statements, the identified actual customers have been deterred from buying Dexon's products and from otherwise dealing with Dexon.

Specifically, such customers have refused to pay for certain Cisco goods, have returned

1 and/or cancelled orders for such goods, have removed Dexon's bids from contention for
2 business, and have ceased doing business with Dexon on other products altogether.

3 243. Dexon has suffered substantial economic damage as a result of this wrongful
4 conduct in an amount subject to proof at trial.

5 **Count VI**
6 **Trade Libel Per Se**

7 244. Dexon repeats and realleges each of the allegations set forth in the preceding
8 paragraphs as if fully set forth herein.

9 245. As detailed herein, Cisco has repeatedly made disparaging and false
10 statements about Dexon's products to Dexon customers Fort Bend Independent School
11 District, Lockridge, Meadowridge and Accuray.

12 246. As detailed herein, such false and disparaging statements included, without
13 limitation: i) falsely claiming all the products sold by Dexon to Lockridge were counterfeit;
14 ii) falsely claiming the products Dexon had contracted to sell to FBISD were "refurbished"
15 rather than new; and iii) that such Dexon customers did not possess or would not possess a
16 valid license for embedded software included with any products purchased from Dexon.

17 247. Cisco made such disparaging and false statements despite knowing: i) Dexon
18 has sold and will continue to sell products governed by Cisco's purported 2012-17 EULA
19 and "Software License Transfer and Relicense Policy": and ii) Cisco's purported 2012-17
20 EULA and "Software License Transfer and Re-license Policy" expressly allow the use and
21 transfer of such embedded software.

22 248. Cisco's statements disparaged Dexon's products.

23 249. Cisco intentionally made such statements knowing such statements were false
24 and misleading or having a complete disregard for whether such statements were true or
25 false and misleading.

26 250. As a proximate result of Cisco's statements, the identified actual customers
27 have been deterred from buying Dexon's products and from otherwise dealing with Dexon.
28 Specifically, such customers have refused to pay for certain Cisco goods, have returned

1 and/or cancelled orders for such goods, have removed Dexon's bids from contention for
2 business, and have ceased doing business with Dexon on other products altogether.

3 251. Dexon has suffered substantial economic damage as a result of this wrongful
4 conduct in an amount subject to proof at trial.

5 252. Such false and misleading statements by Cisco go to the integrity and character
6 of Dexon's business practices, including, without limitation, implying that Dexon misleads
7 its customers as to the nature or quality of its goods, including that Dexon sells "refurbished"
8 products as "new," and that Dexon misrepresents that its secondary market customers will
9 be able to use and transfer Cisco products purchased from Dexon. As a result, damage is
10 presumed for such statements irrespective of any actual damages proven by Dexon at trial.

11 **THIRD PARTY CLAIMS**

12 253. Third Party Plaintiff Dexon Computer, Inc. asserts the following claims
13 against Third Party Defendants Atlantix Global Systems International, LLC, Bizcom
14 Electronics, Inc., Digi Devices Online, Enterprise Business Technologies, Inc., Fiber Cable
15 Connections, MJSI, Multimode Technologies, LLC, Optimum Data, Inc., Paragon, Pure
16 Future Technology, Inc., Seastar IT Trading LLC, Server Tech Supply, Softnetworks, Inc.,
17 Strada Networks, LLC, Unlimited Network Solutions and Wisecom Technologies alleges
18 as follows:

19 **THE PARTIES**

20 254. Third Party Plaintiff Dexon Computer, Inc. ("Dexon") is a Minnesota
21 corporation with its principal place of business at 9201 E. Bloomington Freeway, Suite BB,
22 Bloomington, Minnesota 55420.

23 255. On information and belief, Third Party Defendant Atlantix Global Systems
24 International, LLC is a Georgia limited liability corporation with its principal place of
25 business in Georgia.

26 256. On information and belief, Third Party Defendant Bizcom Electronics, Inc.,
27 is a California corporation with its principal place of business in California.

1 257. On information and belief, Third Party Defendant Digi Devices Online is a
2 foreign corporation with its principal U.S. place of business in Texas.

3 258. On information and belief, Third Party Defendant Enterprise Business
4 Technologies, Inc. is a New York corporation with its principal place of business in New
5 York.

6 259. On information and belief, Third Party Defendant Fiber Cable Connections
7 is a Washington corporation with its principal place of business in Washington.

8 260. On information and belief, Third Party Defendant MJSI is a California
9 corporation with its principal place of business in California.

10 261. On information and belief, Third Party Defendant Multimode Technologies,
11 LLC is a Minnesota limited liability company with its principal place of business in
12 Minnesota.

13 262. On information and belief, Third Party Defendant Optimum Data, Inc. is a
14 Nebraska corporation with its principal place of business in Nebraska.

15 263. On information and belief, Third Party Defendant Paragon is a Massachusetts
16 corporation with its principal place of business in Massachusetts.

17 264. On information and belief, Third Party Defendant Pure Future Technology,
18 Inc. is a California corporation with its principal place of business in California.

19 265. On information and belief, Third Party Defendant Seastar IT Trading LLC is
20 a Washington limited liability company with its principal place of business in Washington.

21 266. On information and belief, Third Party Defendant Server Tech Supply is a
22 Virginia corporation with its principal place of business in Pennsylvania.

23 267. On information and belief, Third Party Defendant Softnetworks, Inc. is a New
24 Jersey limited liability company with its principal place of business in New Jersey.

25 268. On information and belief, Third Party Defendant Strada Networks, LLC is a
26 foreign limited liability company with its principal place of business in British Columbia,
27 Canada.

28

1 269. On information and belief, Third Party Defendant Teksavers is a Texas
2 corporation with its principal place of business in Texas

3 270. On information and belief, Third Party Defendant Unlimited Network
4 Solutions is a corporation with its principal place of business in California.

5 271. On information and belief, Wisecom Technologies is a corporation with its
6 principal place of business in Maryland.

7 **Supply of Alleged Counterfeit and Infringing Product**

8 272. The Third Party Defendants are all reputable dealers and merchants with
9 respect to the Cisco products alleged to be counterfeit and thereby infringing herein
10 (“allegedly infringing Cisco product”).

11 273. Dexon obtained such allegedly infringing Cisco product from the Third Party
12 Defendants. While Dexon denies Cisco’s allegations and believes the subject products to
13 be genuine, Dexon relied in good faith on the Third Party Defendants in procuring or
14 obtaining such products.

15 274. Without limitation, the Third Party Defendants warranted that such products
16 sold to Dexon would be "delivered free of the rightful claim of any third person by way of
17 infringement or the like.” *See* U.C.C. §2-312(3).

18 **FIRST THIRD PARTY CLAIM**
19 **(Indemnification - All Third Party Defendants)**

20 275. Dexon repeats and realleges each of the allegations set forth in the preceding
21 paragraphs as if fully set forth herein.

22 276. Dexon was named in this litigation as a direct result of product procured from
23 and/or supplied by the Third Party Defendants.

24 277. Third Party Defendants should be ordered to indemnify Dexon whether based
25 on express agreement, implied agreement or common law.

SECOND THIRD PARTY CLAIM
(Contribution - All Third Party Defendants)

278. Dexon repeats and realleges each of the allegations set forth in the preceding paragraphs as if fully set forth herein.

279. Dexon was named in this litigation as a direct result of product procured from and supplied by the Third Party Defendants.

280. Dexon is entitled to contribution from Third Party Defendants, whether based on express agreement, implied agreement or common law, to pay or defray any judgment entered against Dexon herein.

PRAYER FOR RELIEF

WHEREFORE, Defendant, Counterclaim Plaintiff and Third Party Plaintiff Dexon Computer, Inc. prays for judgment and relief against Plaintiffs and Counterclaim Defendants Cisco Systems, Inc. and Cisco Technology, Inc. (“Cisco”) and Third Party Defendants Atlantix Global Systems International, LLC, Bizcom Electronics, Inc., Digi Devices Online, Enterprise Business Technologies, Inc., Fiber Cable Connections, MJSI, Multimode Technologies, LLC, Optimum Data, Inc., Paragon, Pure Future Technology, Inc., Seastar IT Trading LLC, Server Tech Supply, Softnetworks, Inc., Strada Networks, LLC, Unlimited Network Solutions and Wisecom Technologies as follows:

a. Dismissing Plaintiffs’ Cisco Systems, Inc. and Cisco Technology, Inc. claims with prejudice, together with costs and disbursements;

b. Awarding Dexon actual damages, subject to proof at trial but in an amount in excess of \$75,000.;

c. For equitable remedial efforts by Counterclaim Defendants sufficient to rehabilitate Dexon’s damaged reputation;

d. Declaring that: i) original purchasers of Cisco products obtained the products and any associated embedded software via a “sale”; ii) there is no valid or enforceable EULA governing the embedded software in Cisco products sold by Dexon on

the secondary market; and iii) Dexon's customers' are free to use and transfer such products pursuant to the first sale doctrine codified at 17 U.S.C. §109.

e. For orders restraining or enjoining Cisco from engaging in similar conduct in the future;

f. Awarding Dexon its costs and expenses of litigation, including reasonable attorneys' fees;

g. An award in Dexon's favor against Third Party Defendants sufficient to compensate Dexon for all economic loss, damages, attorney's fees and costs resulting from the claims herein; and

h. Such other and further relief as this Court deems just and equitable.

Dated: May 11, 2022

/s/Amanda Washton

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DEMAND FOR JURY TRIAL

Dexon Computer, Inc. demands a trial by jury on all issues so triable.

Dated: May 11, 2022

/s/Amanda R. Washton

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